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No. _____

In The

Supreme Court of the United States

October Term, 1988

IDAHO STATE TAX COMMISSION, ET AL.,

Petitioners,

v.

ROBERT F. BLANGERS, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

JAMES THOMAS JONES
Attorney General
State of Idaho

*LARRY M. DUNN
Deputy Attorney General
State of Idaho
State Tax Commission
P.O. Box 36
Boise, Idaho 83722
(208) 334-7530

*Counsel of Record
for Petitioners

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QUESTIONS PRESENTED

I. May a state impose a tax on the income earned by a nonresident individual for performing labor within that state without violating the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

II. Does physical presence within a state by a nonresident individual working within and without a state create a sufficient minimum connection to support the imposition of a state income tax on the income earned within the state so as to satisfy the "nexus" requirement of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

III. Does physical presence within a state by a nonresident individual working within and without a state create a sufficient minimum connection to support the imposition of a state income tax on the income earned within the state so as to satisfy the "nexus" requirement of the Commerce Clause (Art. I, § 8, cl. 3) of the United States Constitution.

PARTIES

The parties to this case, as defined by Rule 19.6, are the petitioners Idaho State Tax Commission, State of Idaho Department of Revenue and Taxation, Commissioner Larry G. Looney, Commissioner Carol M. Dick, Commissioner Morgan Munger, Commissioner Darwin L. Young, Commissioners of the State Tax Commission, State of Idaho, and the State of Idaho.

The respondents are Robert F. Blangers, Patrick R. Bartleson, Robert J. Tully, Walter P. Bartholomew, William M. Richter, Raymond H. Reedy, James H. Weaver, and Walter E. Dunlop, individually and as representatives of a class composed of approximately 309 Washington residents who are employees or former employees or the widows of deceased former employees of the Burlington Northern Railroad.*

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* The trial court held that widows' benefits and retirement benefits received by widows and retired employees were not subject to Idaho income tax. *See,* Appendix E, p. App. 109, *infra.* This ruling was not appealed by either side, and consequently, is not before this Court.

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IDAHO STATE TAX COMMISSION, ET AL.,

Petitioners,

v.

ROBERT F. BLANGERS, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

The Idaho State Tax Commission respectfully petitions the Court for a writ of certiorari to review the Idaho Supreme Court's decision in this proceeding.

OPINIONS BELOW

The Opinion of the Idaho Supreme Court of May 25, 1988, and the Opinion on Denial of Petition for Rehearing of the Idaho Supreme Court of October 28, 1988, are reproduced in Appendix A, p. App. 1, *infra*, and are reported at 763 P.2d 1052 (Idaho 1988). The Idaho Supreme Court's Order Denying Petition for Rehearing and Releasing Opinion on Denial of October 28, 1988, is

reproduced in Appendix B, p. App. 76, *infra;* the Remittitur of that court of October 28, 1988, is reproduced in Appendix C, p. App. 77, *infra;* neither is reported.

The Opinion of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, is reproduced in Appendix D, p. App. 79, *infra;* the Declaratory Judgment of that court is reproduced in Appendix E, p. App. 108, *infra;* neither is reported.

JURISDICTION

The Idaho State Tax Commission, petitioner, seeks a Writ of Certiorari to the Supreme Court of the State of Idaho for review of the Opinion filed May 25, 1988, which reverses the lower court's memorandum opinion and declaratory judgment that the plaintiffs, respondents herein, are subject to Idaho state income tax. The Idaho Supreme Court denied a Petition for Rehearing by Order filed October 28, 1988. An Opinion on Denial of Petition for Rehearing was also filed on October 28, 1988. The Court's jurisdiction to review the Opinion(s) of the Idaho Supreme Court rests on 28 U.S.C. § 1257(a) [formerly 28 U.S.C. § 1257(3)].

CONSTITUTIONAL PROVISIONS INVOLVED

This case arises under the Due Process Clause of the Fourteenth Amendment and the Commerce Clause (Art. I, § 8, cl. 3) of the United States Constitution.

The due process clause provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

The commerce clause provides in pertinent part:

> The Congress shall have power . . . [t]o regulate commerce . . . among the several States. . . .

STATEMENT OF THE CASE

This case presents to the Court, on stipulated facts, a class action suit for declaratory judgment on the question of whether Idaho (or any other state) may impose a tax on compensation paid to nonresident individuals while working within Idaho. The Idaho Supreme Court held that nonresident individuals employed as train crew members on trains operating in Idaho do not have the requisite minimum contacts necessary to support a finding of "nexus" under the due process clause and commerce clause of the United States Constitution. This Court and the highest courts of numerous states have held that a state may impose an income tax on the wages earned by a nonresident individual performing services within the state. *See, e.g., Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 40 S.Ct. 228 (1920); *Lung v. O'Chesky*, 617 P.2d 1317 (N.M. 1980), *appeal dismissed*, 450 U.S. 961, 101 S.Ct. 1475 (1981); *State of Alaska v. Petronia*, 418 P.2d 755 (Wash. 1966), *appeal dismissed*, 389 U.S. 7, 88 S.Ct. 36 (1967); *Jackling v. State Tax Commission*, 58 P.2d 1167 (N.M. 1936). The Opinion by the Idaho Supreme Court is the first decision of any jurisdiction, federal or state, to hold that a state income tax imposed on income earned from labor

performed within a state by a nonresident individual violates the Constitution of the United States. This Court should grant this petition to resolve these important questions regarding the fundamental rights of a state's taxation powers over nonresident individuals.

Respondents herein commenced this action as a class composed of approximately 309 Washington residents who are employees or former employees or the widows of deceased former employees of the Burlington Northern Railroad (hereinafter "employees").[1] The employees – including brakemen, firemen, engineers, conductors, and rear brakemen – work on transcontinental freight trains serving the route between Spokane, Washington and either Whitefish or Missoula, Montana and thereby travel through Idaho. The employees are working within Idaho on a regular and systematic basis. Depending upon whether a time or mileage apportionment factor is used, between 25% and 40% of the wages earned by the employees are earned while in Idaho. The employees argued, *inter alia*, that the income earned while working on trains traveling through Idaho was not subject to Idaho income tax and that the application of the Idaho income tax statutes to income apportioned to the time worked in Idaho violated provisions of the Idaho and United States Constitutions.

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[1] The trial court held that widows' benefits and retirement benefits received by widows and retired employees were not subject to Idaho income tax. *See*, Appendix E, p. App. 109, *infra*. This ruling was not appealed by either side, and consequently, is not before this Court.

In a memorandum opinion and declaratory judgment, which are reproduced as Appendix D and E, p. App. 79-109, *infra*, the trial court held that the provisions of Title 63, Chapter 30 of the Idaho Code (Idaho Income Tax Act) imposed an income tax on wages earned by a nonresident while in Idaho. The trial court further held that if wages are earned from services performed both within and without Idaho, the amount taxable by Idaho should be apportioned according to the amount of service performed in Idaho as compared to the total service. Finally, the trial court upheld the tax against challenges based on the interstate commerce clause, the due process clause and the equal protection clause of the United States Constitution.

On appeal, the Idaho Supreme Court agreed with the trial court that the laws of Idaho impose an income tax on wages earned by nonresident individuals while working in Idaho, but reversed the trial court on the constitutionality of the income tax imposed. Appendix A, p. App. 2, *infra;* 763 P.2d at 1053. Specifically, the Idaho Supreme Court held that nonresident train crew members working on nonstop transcontinental freight trains within the State of Idaho do not have sufficient minimum contacts with Idaho to satisfy the "nexus" requirement of the due process clause of the fourteenth amendment and the commerce clause (Art. I, § 8, cl. 3) of the United States Constitution. *Id.*

The Opinion of the Idaho Supreme Court was filed May 25, 1988. Petitioner timely filed a Petition for Rehearing. The Idaho Supreme Court denied the Petiton

for Rehearing and filed its Opinion thereon on October 28, 1988.

REASONS FOR GRANTING CERTIORARI

I. This Opinion of the Idaho Supreme Court is in Direct Conflict With Decisions of the Highest Courts of Other States.

Although the Opinion of the Idaho Supreme Court is contrary to every prior reported decision, it is *directly* contrary to at least one decision of the highest court of another state. In *Lung v. O'Chesky*, 617 P.2d 1317 (N.M. 1980), New Mexico sought to tax the income of Texas residents who were employed on the White Sands Missile Range, a federal enclave. Texas does not have an individual income tax. The wages of the federal employees were in no way connected to New Mexico markets or commerce, nor were their activities attributable to any economic activity within the state. Nevertheless, the New Mexico Supreme Court upheld the power to impose a state income tax against federal constitutional challenges on the theory that "[t]he opportunity to exercise 'intelligence, skill, and labor while employed in the State of New Mexico' has been held to be sufficient benefit to support an income tax. [Citation omitted.]" 617 P.2d at 1319. On appeal to this Court, the *Lung* case was dismissed for lack of a substantial federal question. 450 U.S. 961, 101 S.Ct. 1475 (1981).

The Idaho Supreme Court specifically rejected the reasoning of the *Lung* case. Appendix A, p. App. 48-49, *infra*, 763 P.2d at 1071. Apparently, merely passing

through a state *to* your workplace on a federal enclave is more constitutionally significant than passing through a state *while* working.

This clearly sets forth a *direct* conflict between the highest courts of two states. This Court should grant this Petition for Writ of Certiorari and resolve this direct conflict between the states.

II. This Opinion of the Idaho Supreme Court Sets a Dangerous and Disruptive Precedent That Will Adversely Affect Every State and Local Taxing District in the Country.

In its Opinion of May 25, 1988, and again in its Opinion on Denial of Petition for Rehearing of October 28, 1988, the Idaho Supreme Court misinterpreted numerous United States Supreme Court and state supreme court decisions, every one of which sustained the taxing authority; the court's decision sets a dangerous and disruptive precedent that will adversely affect every state and local taxing district in the country.

No prior court of any jurisdiction, federal or state, has held that a nonresident individual physically present within a state and performing services and earning income thereby lacks a sufficient nexus to satisfy the due process clause or the commerce clause of the United States Constitution. The opinion is contrary to established fundamental principles of state taxation over nonresident individuals earning income within the state. *Shaffer v. Carter*, 252 U.S. 37, 40 S.Ct. 221 (1920); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 40 S.Ct. 228 (1920); *Lung v. O'Chesky*, 617 P.2d 1317 (N.M. 1980), *appeal dismissed*, 450 U.S. 961, 101 S.Ct. 1475 (1981); *State of Alaska*

v. Petronia, 418 P.2d 755 (Wash. 1966), *appeal dismissed*, 389 U.S. 7, 88 S.Ct. 36 (1967); *Jackling v. State Tax Commission*, 58 P.2d 1167 (N.M. 1936).

More than fifty years ago, this Court held that a state may tax the " . . . incomes accruing to nonresidents from their property or business within the state, *or their occupations carried on therein*, enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders." [Emphasis added] *Shaffer v. Carter*, 252 U.S. at 52, 40 S.Ct. at 225. The *Shaffer* Court upheld a state income tax on the income earned by a nonresident individual from business transacted within the state against challenges under the due process clause and commerce clause of the United States Constitution.

In an opinion issued contemporaneously with *Shaffer*, this Court also held that a state income tax imposed on a nonresident individual carrying on a profession or occupation within the state would not violate the due process clause and commerce clause of the United States Constitution. *Travis v. Yale & Towne Mfg. Co., supra.*

Not since the decisions in *Shaffer* and *Travis* has this Court addressed, much less sustained, a challenge by a nonresident *individual* that a state income tax imposed on wages earned while performing services within the state does not pass constitutional muster under the due process clause or commerce clause. This issue was laid to rest by this Court's statement in *Shaffer:*

> That the state, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for

> the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement.

252 U.S. at 50, 40 S.Ct. at 225.

In the area of state taxation of nonresidents, this Court has historically looked to whether or not the nonresident has subjected itself to the jurisdiction of the state. *Shaffer v. Carter*, 252 U.S. at 51, 40 S.Ct. at 225 (a state's power to tax " . . . may be exercised upon every object brought within its jurisdiction . . . ." citing *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819)); *Farmers' Loan & Trust Co. v. State of Minnesota*, 280 U.S. 204, 210, 50 S.Ct. 98, 99 (1930) ("In this Court the presently approved doctrine is that no state may tax anything not within her jurisdiction without violating the Fourteenth Amendment."); *State of Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444, 61 S.Ct. 246, 250 (1940) (this Court equated the phrase "jurisdiction to tax" with the constitutional test " . . . whether property was taken without due process of law . . . "); *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 96, 68 S.Ct. 1475, 1483 (1948) (the concurring opinion of Mr. Justice Rutledge equating "due process" with "jurisdiction to tax"); *Complete Auto Transit v. Brady*, 430 U.S. 274, 282, 97 S.Ct. 1076, 1081 (1977) (equating "due process" with "jurisdiction to tax" by quoting the concurring opinion of Mr. Justice Rutledge in *Memphis Natural Gas Co. v. Strong, supra*).

State supreme courts have also equated the nexus requirement of due process with jurisdiction over the party sought to be taxed. *Moore Motor Freight Lines, Inc. v. Wisconsin Dept. of Tax.*, 111 N.W. 2d 148 (Wis. 1961);

Jackling v. State Tax Commission, supra (quoting from *Shaffer v. Carter, supra*: "[t]he power of taxation . . . is necessarily limited to subjects within the jurisdiction of the state.").

The employees in the instant case have total, complete, and absolute physical presence within the state. If a crime were to be committed against, or by, one of these employees while working on a train in Idaho, the jurisdiction for the prosecution of that crime would be in Idaho. Idaho Code § 19-301 *et. seq.* If an employee on the train caused an injury to another while in Idaho, jurisdiction for the cause of action would be in Idaho. Idaho Code § 5-514. If an employee on the train was injured while in Idaho, jurisdiction under a workmen's compensation claim could be in Idaho. Idaho Code § 72-707. If a subpoena were issued naming an employee working on the train, service would be proper while the train was in Idaho. Idaho Code § 19-3007.

As applied to the power of a state to tax, due process is a fundamental principle which limits state action to only those objects within the jurisdiction of the state. The Idaho Supreme Court has now determined that due process requires something more than jurisdiction.

The Opinion of the Idaho Supreme Court sets a dangerous and disruptive precedent. It is contrary to established decisions of every jurisdiction, federal and state. It will adversely affect every state and local taxing district in the country. It must be reviewed by this Court.

SUMMARY

This decision of the Idaho Supreme Court is in direct conflict with decisions of the highest courts of other states. Every prior reported decision of every jurisdiction, federal and state, is in agreement that a state income tax imposed on a nonresident individual's income which is earned within that state passes constitutional muster. Taxpayers in other jurisdictions are now lining up to challenge taxation of nonresidents based on Idaho's decision. To review this disruptive precedent and to resolve a direct conflict between the states, this Court should grant this Petition for a Writ of Certiorari.

CONCLUSION

The Court should grant this Petition for a Writ of Certiorari to review this dangerous and disruptive precedent which will adversely affect every state and local taxing district in the country and to resolve a direct conflict between the states.

DATED this 26th day of January, 1989.

Respectfully submitted,

LARRY M. DUNN
Deputy Attorney General
State Of Idaho
State Tax Commission
P.O. Box 36
Boise, ID 83722
(208) 334-7530
Counsel for Petitioner

APPENDIX A

1988 Opinion No. 39.

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 16404

ROBERT F. BLANGERS, PATRICK R. BARTLESON, ROBERT J. TULLY, WALTER T. BARTHOLOMEW, WILLIAM M. RICHTER, RAYMOND H. REEDY, JAMES H. WEAVER and WALTER E. DUNLOP, Plaintiffs-Appellants Cross-Respondents, v. STATE OF IDAHO, DEPARTMENT OF REVENUE AND TAXATION, IDAHO STATE TAX COMMISSION, COMMISSIONER LARRY G. LOONEY, COMMISSIONER CAROL M. DICK, COMMISSIONER MORGAN MUNGER AND COMMISSIONER DARWIN L. YOUNG, COMMISSIONERS OF STATE TAX COMMISSION, STATE OF IDAHO AND THE STATE OF IDAHO, Defendants-Respondents, Cross-Appellants.	BOISE, FEBRUARY 1988 TERM FILED: May 25, 1988 FREDERICK C. LYON, CLERK

Appeal from the District Court of the First Judicial District of the State of Idaho, Kootenai County. Hon. Watt E. Prather, District Judge.

Appeal from a declaratory judgment granted in favor of the respondents, Tax Commission, holding appellants subject to Idaho income tax. *Reversed.*

Sims, Liesche & Newell, P.A., Coeur d'Alene, Idaho; Paine, Hamblen, Coffin, Brooke & Miller, Spokane, Washington, attorneys for appellants, cross-respondents. Mr. Wm. Fremming Nielsen argued.

Hon. Jim Jones, Attorney General; Larry M. Dunn, Deputy Attorney General; Boise, Idaho, attorneys for respondents, cross-appellants. Mr. Larry M. Dunn argued.

JOHNSON, J.

This is an income tax case. The primary issue is whether the State of Idaho may impose an income tax on nonresident railway employees on nonstop transcontinental freight trains traveling across the panhandle of Idaho. We agree with the conclusion of the trial court that the laws of Idaho require the employees to pay Idaho income tax, but reverse the decision of the trial court upholding the constitutionality of the income tax on the earnings of these nonresident employees. We conclude that the Idaho law imposing a tax on the income of these employees while they are traveling through Idaho violates the due process clause of the fourteenth amendment and the commerce clause (art. I, § 8, cl. 3) of the United States Constitution.

I.

Facts

Burlington Northern Railroad Company (BN) a federal land grant railroad, employed engineers, brakemen, firemen and conductors (the train crews), all of whom

were residents of the state of Washington and not Idaho residents or domiciliaries. In the course of their employment with BN the train crews occupied nonstop transcontinental freight trains (the trains) traveling between Spokane, Washington, and Whitefish or Missoula, Montana, and back to Spokane. The mileage and time spent in Idaho constituted less than fifty percent of the total mileage and time of each of the members of the train crews while they were employed by BN.

The trains were "through" trains that did not perform any switching in Idaho. The trains made no scheduled stops in Idaho. Orders directing the trains came from outside the borders of Idaho. There were no crew changes within Idaho. The train crews neither reported for work nor were they dismissed in Idaho.

In the spring of 1983, the train crews received written notice from the Idaho State Tax Commission (the Commission) that they were subject to Idaho income tax. The notice indicated that all taxes due for years prior to 1978 would be waived and no penalties imposed, if they filed returns for the years 1978 through 1982 and paid the income taxes before August 1, 1983.

A class action lawsuit was filed on behalf of the train crews seeking declaratory judgment determining whether the compensation earned while they were traveling through Idaho was subject to Idaho income tax and whether the application of the Idaho income tax statutes to these earnings violated provisions of the Idaho Constitution and the United States Constitution.

The parties stipulated to the facts of the case. The trial court ruled that the train crews were subject to Idaho

income tax for income earned by them while employed on trains traveling through the state, that the imposition of the tax did not violate provisions of either the Idaho Constitution or the United States Constitution, but that the statute of limitations barred the Commission from imposing a tax prior to 1980.

The train crews appealed the declaratory judgment of the trial court. The Commission cross-appealed the trial court's decision that the statute of limitations prevented the Commission from assessing any tax against the train crews for any period prior to 1980.

II.

The Idaho Income Tax Statutes Apply to the Compensation of the Train Crews While Employed on Trains Traveling Through the State of Idaho

In 1959 the Idaho Legislature declared its intent "to impose a tax on . . . the income of nonresidents which is the result of activity within or derived from sources within this state." I.C. § 63-3002. This intent has remained unchanged to date and was implemented by a provision imposing a tax "upon that part of the taxable income of any nonresident individual . . . derived from sources within the state of Idaho." I.C. § 63-3024. In 1965 this Court held that a nonresident railroad employee who was employed on a train that made a daily run from a town within Idaho to a town outside Idaho was required to pay income tax on that portion of his income that was allocated to the miles the train traveled in Idaho. Gee v. West, 90 Idaho 173, 409 P.2d 116 (1965). The train crews contend that in 1965 the Idaho Legislature changed the theory of taxation for nonresidents to a "base of operations" theory.

They argue that under this theory, a nonresident is taxed only if the nonresident has a base of operations in the state. For support they cite a concurring opinion in *Gee*. This contention is not sustained by the Idaho income tax statutes that have been in effect at times pertinent to this case.

From 1976 until 1986 I.C. § 63-3024 imposed a tax "upon that part of the taxable income of any nonresident individual . . . derived from sources within the state of Idaho as set forth in section 63-3027A, Idaho Code." In 1986 the words "as set forth in section 63-3027A" were changed to "computed as required by section 63-3027A." 1986 Idaho Sess. Laws, ch. 90, pp. 262, 267. Despite periodic amendments by the legislature of I.C. § 63-3027A since 1976, this statute has continued to provide for the determination of the taxable income of a part-year or nonresident individual. The contention of the train crews that I.C. § 63-3027A has failed to set forth a means of determining what portion of the income of a nonresident is derived from sources within the state of Idaho is fallacious. The purpose of the reference in I.C. § 63-3024 to I.C. § 63-3027A was to provide for a means of computing taxable income, not to determine what portion of the gross income of a nonresident was derived from sources within the state of Idaho.

The portion of the income of a nonresident "derived from sources within the state of Idaho" must be determined by reference to the decisions of this Court in Barraclough v. State Tax Commission, 75 Idaho 4, 266 P.2d 371 (1954) and *Gee*. These decisions established that where compensation for personal services is involved, the source of income is the location where the services are

performed. Therefore, applying the statutes and this Court's rulings in *Barraclough* and *Gee* concerning the source of income for personal services, the compensation of the train crews for the services performed while they pass through Idaho are within the coverage of the Idaho income tax laws.

The regulations of the Commission have been consistent with this result. The challenge of the train crews that these regulations have violated the uniformity requirement of art. 7, § 5 of the Idaho Constitution is not valid. That section applies only to *ad valorem* taxes. Johnson v. Diefendorf, 56 Idaho 620, 627, 57 P.2d 1068, 1071 (1936).

Because of our decision, *infra*, declaring that the application of the Idaho income tax statutes to the income of the train crews while traveling through Idaho is unconstitutional, we do not consider the question of the applicable statute of limitations.

III.

There Is Not A Sufficient Nexus To Sustain Taxation of the Compensation of the Train Crews While Traveling Through Idaho

The train crews contend that their presence in Idaho while traveling on the transcontinental trains is not a sufficient nexus under the due process clause of the fourteenth amendment and the commerce clause of the Constitution of the United States to allow Idaho to subject the compensation they earn while traveling through Idaho to state income taxes. We agree.

The United States Supreme Court has held that "just as a state may impose general income taxes upon its own

citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to nonresidents from their property or business within the state, or their occupations carried on therein." Shaffer v. Carter, 252 U.S. 37, 52 (1920). There the Court upheld an Oklahoma income tax on an Illinois resident who had engaged in the oil business in Oklahoma "having purchased, owned, developed and operated a number of oil and gas mining leases, and being the owner in fee of certain oil-producing land, in that state." *Id.* at 45. The Court held that the Oklahoma tax was valid under both the due process clause of the fourteenth amendment and the commerce clause. On the same day that *Shaffer* was decided by the Supreme Court, the Court also issued its opinion in Travis v. Yale & Towne Manufacturing Co., 252 U.S. 60 (1920), sustaining the validity of a New York net income tax imposed on a business, trade, profession or occupation carried on in New York by nonresidents. In *Travis* the Court upheld the tax against a challenge based on the due process clause of the fourteenth amendment. No challenge was presented before the Supreme Court on the basis of the commerce clause. *Id.* at 75-76.

The leading case on the taxation of the personal income of nonresidents by a state since *Shaffer* and *Travis* is American Commuters Association, Inc. v. Levitt, 405 F.2d 1148 (2nd Cir. 1969). There the Second Circuit upheld the validity of New York state and city laws imposing income taxes on nonresidents who were employed in the city of New York, although they lived in New Jersey and Connecticut and commuted to New York

for their work. One of the challenges made by the nonresident commuters to the New York income taxes was under the due process clause of the fourteenth amendment. The Second Circuit cited both *Shaffer* and *Travis* in support of its conclusion that the New York tax on the personal income of nonresidents did not run afoul of the due process clause. *Id.* at 1152. The Court pointed out that the nonresident commuters had "admitted that they receive earned income in New York and already receive the substantial benefit of being able to do business there, a benefit valuable enough to them so that they suffer the ills of commuting in order to obtain it." *Id.* at 1153. The Court then pointed out:

> While so doing business and acquiring personal income thereby, state and city furnish the non-resident commuting worker all the general services furnished residents, such as police and fire protection. The test controlling this case is the test laid down by the Supreme Court in Wisconsin v. J.C. Penney, [311 U.S. 435 (1940)], where the Court said: "the simple but controlling question is whether the state [or City] has given anything for which it can ask return." 311 U.S. at 444, 61 S.Ct. at 250. It is unnecessary further to point out that this test has been adequately met.

Id.

Since *Shaffer* and *Travis* there has been a plethora of cases decided by the Supreme Court concerning the standards to be applied under the due process clause of the fourteenth amendment and the commerce clause in determining the constitutionality of various other types of taxes imposed by the states on nonresident individuals and corporations. For our purposes in this case, the most significant evolution that has occurred in the decisions of

the Supreme Court is the development of the requirement that there be a sufficient nexus between the presence, property or activities of the nonresident and the state attempting to impose the tax in order to survive a challenge under the due process clause or the commerce clause. This evolution culminated in two decisions of the Supreme Court in 1977. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) and National Geographic Society v. California Board of Equalization, 430 U.S. 551 (1977). In both of these cases the Court synthesized its prior rulings to announce that nexus is a prerequisite before a state may impose a tax on a nonresident. *Complete Auto*, 430 U.S. at 279; *National Geographic*, 430 U.S. at 556. In both cases the Court cited as authority four cases decided by the Court during the period from 1940 through 1964 in support of the nexus requirement. These cases were Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940), Memphis Gas Co. v. Stone, 335 U.S. 80 (1948), Northwestern Cement Co. v. Minnesota, 358 U.S. 450 (1959), and General Motors Corp. v. Washington, 377 U.S. 436 (1964). An examination of the development of the concept of nexus in these cases and in *Complete Auto*, and *National Geographic* leads us to our conclusion in this case.

In *J.C. Penney Co.* the Court began to formulate the nexus requirement by stating:

> A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.

> Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. "Taxable event," "jurisdiction to tax," "business situs," "extraterritoriality," are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.

311 U.S. at 444.

In applying this formulation the Court upheld a Wisconsin general corporate income tax on earnings of corporations chartered by other states when the earnings were attributable to the Wisconsin activities of the corporation. The Court pointed out that "the incidence of the tax as well as its measure is tied to the earnings which the State of Wisconsin has made possible, insofar as government is the prerequisite for the fruits of civilization . . . ." *Id.* at 446. The Court found acceptable the application of the Wisconsin tax as applied to dividends declared by foreign corporations in other states out of income derived from property located and business transacted in Wisconsin.

In *Memphis Natural Gas Co.* the Court disposed of any due process claim by stating succinctly that the gas

company's property was "in the taxing state where the taxable incidents occurred." 335 U.S. at 86. With regard to the commerce clause, the Court considered whether Mississippi could impose a franchise or excise tax on the capital used, invested or employed in the exercise of any power, privilege or right enjoyed by a corporation within the state. Concerning what is now denominated as the nexus standard, the Court stated that the question was whether the tax could be imposed where the activities of the gas company in the state were the maintenance, repair and manning of an interstate gas pipeline. The Court focused on "whether these activities are so much a part of the interstate business as to be under the protection of the Commerce Clause as this Court has construed it." *Id.* at 93. The Court concluded:

> We think that the State is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its borders. Of course, the interstate commerce could not be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business.

Id. at 96.

In *Northwestern States Portland Cement Company* the Court upheld under both the commerce clause and the due process clause net income taxes imposed by Minnesota and Georgia on that portion of a foreign corporation's net income earned from and fairly apportioned to business activities within each state, even though those

activities were exclusively in furtherance of interstate commerce. The Court found that the corporations which had challenged the tax were "sufficiently involved in local events to forge 'some definite link, some minimum connection' sufficient to satisfy due process requirements." 358 U.S. at 465. (Citation omitted.) The Court found that the corporations engaged in "substantial income-producing activity" in Minnesota and Georgia. *Id.* In the Minnesota case the Court found that almost half of the corporation's income was derived from sales in the state that were shown to be promoted by "vigorous and continuous sales campaigns run through a central office located in the State." *Id.* With regard to the activities of the corporation in Georgia, the Court stated that while the percent of sales was not available "the course of conduct was largely identical" to that of the corporation in Minnesota. *Id.*

In *General Motors* the Court considered the constitutional validity under the commerce clause and the due process clause of a Washington tax imposed on the privilege of engaging in business activities within the state measured by gross wholesale sales of motor vehicles, parts and accessories delivered in the state by General Motors. The Court pointed out that it had decided a long line of cases "holding that an in-state activity may be a sufficient local incident upon which a tax may be based." 377 U.S. at 447. The Court focused on the fact that the divisions of General Motors had district managers, service representatives and other employees who were residents of Washington and who performed substantial services in relation to functions of the company in the state, "particularly with relation to the establishment and

maintenance of sales, upon which the tax was measured." *Id.* In formulting the standard to be used in determining the validity of the tax, the Court stated that it must determine whether there was " 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-345." *Id.* at 448. In upholding the tax the Court observed:

> Although mere entry into a State does not take from a corporation the right to continue to do an interstate business with tax immunity, it does not follow that the corporation can channel its operations through such a maze of local connections as does General Motors, and take advantage of its gain on domesticity, and still maintain the same degree of immunity.

Id.

In *Complete Auto* after a discussion of the nexus requirement and other standards to be utilized in commerce clause cases involving the taxation of nonresidents, the Court pointed out that "no claim is made that the activity is not sufficiently connected to the State to justify a tax." 430 U.S. at 287. The facts there indicated that General Motors assembled vehicles outside the state of Mississippi that were delivered to dealers in Mississippi. The vehicles were shipped by rail to Jackson, Mississippi, where they were loaded onto trucks and transported to the Mississippi dealers by a Michigan corporation that was paid on a contract basis for the transportation from the railhead to the dealers. The Court upheld sales taxes assessed against the Michigan corporation for sales of transportation services in Mississippi.

In *National Geographic* the Court affirmed a California Supreme Court decision upholding the imposition upon National Geographic of a use-tax-collection liability measured by mail-order sales of merchandise to customers in California from the District of Columbia and Maryland. National Geographic had maintained offices in San Francisco and Los Angeles since 1956. Each office was originally staffed with one salesman and one secretary. Each office subsequently increased its personnel to four. The basic function of the offices was to solicit advertising for the magazine published by National Geographic. Sales of advertising copy by the two offices aggregated about $1 million annually. 430 U.S. at 554 n.2. The Court stated that the question presented by the case was "whether the Society's activities at the offices in California provided sufficient nexus between the out-of-state seller appellant and the State – as required by the Due Process Clause of the Fourteenth Amendment and the Commerce Clause – to support the imposition upon the Society of a use-tax-collection liability." *Id.* at 554. The Court rejected the rationale of the California supreme Court that the " 'slightest presence' " within a taxing state " 'independent of any connection through interstate commerce' " would permit a state constitutionally to impose the duty of collecting the use tax generated from mail order purchasers. *Id.* at 556. The Court pointed out that National Geographic's maintenance of two offices in California and solicitation by employees assigned to those offices of advertising copy in the range of $1 million annually "establish a more substantial presence than the expression 'slightest presence' connotes." *Id.* The Court held that National Geographic's "maintenance of two offices

in California and activities there adequately establish a relationship or 'nexus' between the Society and the State that renders constitutional the obligations imposed" upon National Geographic. *Id.*

Recent decisions of the Supreme Court confirm that the formulation of the requirement of nexus that culminated in *Complete Auto* and *National Geographic* continues to be the standard applied by the Court. *E.g.*, Tyler Pipe Industries, Inc. v. Washington Department of Revenue, 107 S.Ct. 2810 (1987). In *Tyler* the Court cited *National Geographic* and agreed that there was a sufficient nexus to impose a tax on an out-of-state manufacturer where the manufacturer's sales representatives performed activities in Washington necessary for the maintenance of the manufacturer's market and protection of its interests in Washington. The Court concurred with the determination of the Washington Supreme Court that " 'the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.' " *Id.* at 2822, *quoting* 715 P.2d 123, 129 (Wash. 1986).

With these authorities in mind, the question in this case is whether the presence of the train crews in Idaho while traveling through on transcontinental trains that make no scheduled stops is sufficient under the due process clause of the fourteenth amendment and the commerce clause to establish the requisite nexus for imposing an income tax on the compensation earned by the train crews during that time.

The train crews correctly point out that their wages while traveling through Idaho are not attributable to any economic activity within Idaho, and that Idaho markets and commerce do not affect their income in any degree. They are present in Idaho only by virtue of the fact that the train on which they are employed must necessarily traverse the panhandle of this state while moving from Washington to Montana or *vice versa*. Their mere presence here does not provide the nexus necessary to allow Idaho to tax the income they earn while in transit through the state.

While the Idaho income tax statutes and the decisions of this Court in *Barraclough* and *Gee* indicate that for statutory purposes, Idaho is the source of the compensation of the train crews while they are traveling through Idaho, in the sense of the due process clause and the commerce clause, Idaho is not the source of this income, since there is no contribution by Idaho to the production of this income. It would be unfair to allow the state to impose a tax on the income of the train crews earned while they are merely passing through Idaho.

Our decision is consistent with the decision of the Supreme Court of Washington in State of Alaska v. Petronia, 418 P.2d 755 (Wash. 1966). In that case the Washington Supreme Court upheld an income tax by the state of Alaska on the earnings of seamen while the vessels upon which the seamen were working were within Alaska's boundaries. The court pointed out the importance of the economic activity generated by the state of Alaska in determining that the contacts of the seamen with Alaska were sufficient to fulfill the nexus requirement:

> Probably the most significant benefits in the eyes of these defendant seamen are the wages they contemplated receiving for their services during the course of the vessel's voyage. The business productivity generated by Alaska was accountable for the wages earned by the defendants when they were in Alaskan waters. . . . We are satisfied that the benefits of employment afforded by this economic activity of the state of Alaska constituted minimum connections within the rule to avoid a denial of due process under the Fourteenth Amendment to the United States Constitution.

418 P.2d at 758-59.

Merely because the train crews were on the payroll of BN while in transit through Idaho is not a sufficient basis under the due process clause to justify imposing an income tax on these earnings. No business productivity generated by Idaho was accountable for the wages earned by the train crews when they were in Idaho. In addition, using the ultimate test enunciated by the Supreme Court in *J.C. Penney Co.* Idaho has not given anything to the train crews for which it can ask return. Here, there is no showing that the presence of the train crews in Idaho cause the state, in the words of the Court in *J.C. Penney Co.*, to give "anything for which it can ask return." 311 U.S. at 444. It is BN, not the train crews, to which the state has given anything for which it can ask return. The train crew do not owe their livelihood to Idaho, but rather to their employment by BN, which transports them through Idaho without stop in the course of their employment.

If the due process clause allows Idaho to tax the income earned by the train crews while in Idaho, then we must be prepared to sustain taxes on the income earned

by any person who crosses Idaho by any means without stopping or transacting business here, but who is being compensated while in transit. We are not prepared to say that the constitution permits taxation by the state in this fashion. There is not a sufficient nexus to allow such a tax under either the due process clause or the commerce clause.

IV.

Conclusion

The declaratory judgment of the trial court is reversed.

Costs to appellants.
No attorney fees on appeal.
BAKES, J., concurs.
SHEPARD, C.J., concurs in result.

HUNTLEY, J., dissenting

The majority opinion today is one of the most disruptive decisions ever to emanate from this bench. It is an opinion totally unsupported by the most basic of legal and taxation principles. It is a decision founded upon no precedent from Idaho or any other jurisdiction in this nation. The majority, perhaps due to a knee-jerk reaction against the imposition of any tax whatsoever, has misinterpreted the law and hatched an unsound analysis leading to the establishment of an incorrect concept of the application of the term nexus to income tax cases.

This case presents a single simple issue, the positing of which suggests the answer to all who do not permit

their reasoning processes to become clouded by complex legalese and other profundities:

> May a state impose an income tax on nonresidents working within the boundaries of the state?

The answer:

> (1) The power of Idaho to levy income taxes upon those who work in the state is permitted under both the United States Constitution and the Idaho Constitution.
>
> (2) Not one single recognized case authority from any court in this nation holds this tax on the railroaders improper or unconstitutional.

The plaintiff railroaders work in three states as they make their daily run: Washington, Idaho, and Montana. Some earn as much as 36% of their income, that is more than $20,000 per year, while within the Idaho segment.

The Idaho statutory scheme imposes tax on the income of nonresidents derived from sources within Idaho. I.C. § 63-3002 provides: "Declaration of intent. – It is the intent of the legislature . . . to impose a tax on . . . the income of nonresidents which is the result of activity within or derived from sources within this state." I.C. § 63-3024 mirrors I.C. § 63-3002 and requires a nonresident taxpayer earning income from Idaho sources to file a state tax return.[1] "Sources" has been defined by this Court:

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[1] I.C. § 63-3024 states in pertinent part:

> **63-3024. Individuals' tax and tax on estates and trusts.** – A tax is hereby imposed for each taxable year commencing on and after Januaury 1, 1987, upon every resident individual, trust or estate which shall be measured by his or its

(Continued on following page)

> The word "sources" when used in statutes dealing with sources of income as compensation for personal services has reference not to the person or entity paying for the services, but to the location where the services are performed. It is generally held that if the income is compensation for labor or services, the *place where the labor is performed or services rendered is decisive as being the source of income.* (Citations omitted.) (Emphasis added.)

Barraclough v. State Tax Commission, 75 Idaho 4, 10, 266 P.2d 371, 374-375 (1954). For a similar interpretation of the Internal Revenue Code, *see,* Motors Insurance Corporation v. United States, 530 F.2d 864, 876 (Ct.Cl. 1976).

The *Barraclough* holding was reinforced in Gee v. West, 90 Idaho 173, 409 P.2d 116 (1955), where we held the Idaho taxing scheme only allowed for the imposition of a state income tax on the income earned in Idaho by a nonresident. The taxpayer in *Gee* resided in Washington, and worked on a train which began and ended its daily run in Idaho, but for the greater part of the run traversed through Washington. The tax commission attempted to impose a tax on all of the taxpayer's earnings arguing that he had a business situs in Idaho. We ruled that business situs was irrelevant because "the intent of the Legislature was to tax only the amount of income a nonresident received as compensation for labor or personal services performed in Idaho and derived from Idaho sources" *Id.* at 178, 409 P.2d at 118. A proper interpretation of the statutory scheme required an

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(Continued from previous page)

taxable income, and upon that part of the taxable income of any nonresident individual, trust or estate derived from sources within the state of Idaho computed as required by section 63-3027A, Idaho Code.

allocation of the taxpayer's income between Idaho and Washington based upon the respective mileage and time spent in each state.

To impose an Idaho income tax on the Burlington Northern employees is not contrary to the taxing statutes. The word "sources" has been defined in a territorial sense, and as such, any income earned within the boundaries of the state of Idaho by a nonresident triggers the application of I.C. § 63-3024. *See also,* Futura v. State Tax Commission, 92 Idaho 288, 442 P.2d 174 (1968) (the word "sources" when used in statutes dealing with dividend income from nonqualifying corporation has reference not to the location of entities issuing or receiving the dividend, but rather to location of business activities wherein the earnings were derived.)

In a similar action brought in Montana, this same class of railroaders recently *stipulated* to a judgment that income earned while rolling over the tracks in Montana is subject to Montana income tax.[2] Is a determination of the absence of "nexus" based upon the distinction that the train "rolls and stops" in Montana while it only "rolls" in Idaho an exercise in judicial craftsmanship or resultsmanship?

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[2] A copy of the Montana Court order is attached hereto as Appendix A. Unfortunately, the Attorney General did not bring this case to our attention and the railroad attorney professed no knowledge of it at our initial oral argument. The lack of forceful advocacy by the attorneys for the State in failing to present and argue the implications of the Montana stipulation, and in failing to present to this Court the broader ramifications of the result reached by the majority herein, is most disturbing.

As the majority notes, the power of a state legislature to tax the income of non-residents was affirmed by the United States Supreme Court in 1920 in Shaffer v. Carter, 252 U.S. 37, and Travis v. Yale & Towne Manufacturing Co., 252 U.S. 60. *Shaffer* and *Travis* remain the law today and when one reads the majority opinion referring thereto, one would expect the case to be affirmed because it is conceded by all that the extent to which there will be any exemption to taxation is a matter of legislative, not judicial, policy. Not so – as the majority later proceeds to a strained and tortured definition of "nexus" to forge a different result.

The majority next cites to American Commuters Association v. Levitt, 405 F.2d 1148 (2nd Cir. 1969) wherein state and city income taxes imposed by New York on New Jersey and Connecticut residents were upheld on the basis that New York provides general services such as fire and police protection to those residents. Since neither Montana nor Washington provide fire and police protection for our train as it proceeds through Idaho, one might think that *Levitt, supra,* decides the issue in favor of affirmance. Not so – as our majority tortures the concept of "nexus" to escape *Shaffer, Travis* and *Levitt*.

The majority next cites to J.C. Penney Co., 311 U.S. 735 (1940), to ascertain the meaning of nexus:

> A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.

Again, as our train traverses Idaho, are those benefits, protections, and opportunities being provided by Washington, Idaho, or Montana; or are the employees in *no state at all* for income tax purposes because wheels and tracks magically separate them from both *terra firma* and the Idaho Income Tax?

If one of the train crew were to be mugged by a passenger, would the "nexus" for criminal law purposes be in Washington, from whence the train was dispatched; or in Montana, where the wheels might later stop rolling; or in Idaho, where that act was committed? But was not the act of earning the money herein done in Idaho? Is nexus to be defined differently because we cherish law and order and disdain taxes?

The majority summarizes *J.C. Penney Co., supra,* in part with the following sentence:

> In applying this formulation the Court upheld a Wisconsin general corporate income tax on earnings of corporations chartered by other states when the *earnings were attrituable to the Wisconsin activities of the corporation.* (Emphasis added).

Were not the earnings of our train crew attributable to activities in Idaho?

Now please reread the majority's cogent discussion at page ___ of Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948) and wager a guess at which result that case would take us to if you didn't know the majority's ultimate conclusion?

Next, at page ___, the majority cogently discusses Northwestern Cement Co. v. Minnesota, 358 U.S. 450

(1959) in a way which would lead one to think they were about to affirm the tax commission herein – not so.

The majority next notes that in General Motors Corp. v. Washington, 377 U.S. 436 (1964):

> The Court pointed out that it had decided a long line of cases "holding that an in-state activity may be a sufficient local incident upon which a tax may be used."

If the *activity* of our trainmen was not in Idaho when the train was in Idaho, where was it – in the great Sovereign State of Suspension?

Discussing *General Motors* further our majority states:

> In formulating the standard to be used in determining the validity of the tax, the Court stated that it must determine whether there was "some definite line, *some minimum connection*, between a state and the person, property or transaction it seeks to tax." Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-45, 74 S.Ct. 535, 539, 98 L.Ed. 744 (1954).

Why does the majority deny that at least "some *minimum* connection" exists between Idaho and our trainmen's earning of income? Were the Idaho panhandle mileage not interposed between Washington and Montana, would not the hours of work and the monthly compensation be less for operating from Spokane to Missoula and back?

Since the *General Motors* court held that "some minimum connection was enough nexus to support the imposition of a tax, would the majority here have us believe that the contact of the trainmen is to be quantified as something even *less than* minimum. If so, what is the descriptive adjective?

The majority next takes one paragraph each to discuss Complete Auto Transit Inc. v. Brady, 430 U.S. 274 (1977) and National Geographic Society v. California Board of Equalization, 430 U.S. 274, both of which *sustain* the taxing powers, and reasons therefrom that by *sustaining* the power to tax, those cases stand for the proposition Idaho has no power to tax. I find the majority's reasoning process unfathomable at best.

The majority also notes that the U.S. Supreme Court, while finding that the *slightest presence* in the state was not enough to support taxing power, nevertheless held National Geographic had a "more substantial presence [in California] than the expression 'slightest presence' connotes." The Court did not define or describe what a "slightest presence" resembles. However, it is doubtful from reading the text of *National Geographic* that the Supreme Court would hold that total, complete, absolute physical presence of a train crew within Idaho is *"less* than 'more substantial than slightest.'" In fact, a person schooled neither in law nor logic might observe that a human being is either in Idaho or out of Idaho while working, leaving the term "slightest presence" to only describe that condition where only one's big toe is inside the boundary.

The next to final case cited by the majority is Tyler Pipe Industries, Inc. v. Washington Department of Revenue, 107 S.Ct. 2810 (1987), which *sustained* the tax on an out-of-state manufacturer because it had a sales representative in the state. How is *Tyler* authority for the majority's result? One might suggest that if *Tyler* imposes the tax on the non-present corporation because of the agent being within the state, one should reason that if the

person's presence provides nexus over the corporation, the person's presence also provides nexus over the person which provides the nexus for the corporation.

This dissent, to this point, has discussed most of the cases cited through page ___ of the fourteen and one-half page majority opinion. The majority has cited eleven cases, all of which *sustain* taxing power under various degrees and types of contact, and none of which hold against the finding of nexus; the majority then concludes that there is no nexus here to require a wage-earner to pay taxes on income earned while physically working in Idaho. Some judicial magic!!

One might wonder why neither the appellants nor the majority have been able to find a single case on point which holds against the presence of nexus in a case like this, despite all the history of income taxation throughout this nation. Perhaps it is because most lawyers and all other courts have read Webster's definition of nexus: "Connection; interconnection; tie; link." While these trainmen are working in Idaho, are they not more physically connected to this state than any other?

Finally, the majority cites State of Alaska v. Petronia, 418 P.2d 755 (Wash. 1966), another case *sustaining* (not rejecting) the taxing power. In *Petronia*, the Washington Supreme Court was faced with a case involving circumstances similar to those in the present case. At issue was whether the state of Alaska could constitutionally levy a tax on the net income of seamen engaged in interstate and foreign commerce, where the tax was levied only on that portion of their net income which was attributable to their activity within the boundaries of Alaska. (418 P.2d

757). Like the trainmen, the seamen in *Petronia* argued that virtually all the benefits afforded them by Alaska were *de minimus*, and that virtually all the protection normally afforded by a state to a nonresident employee was afforded to them exclusively by the federal government. The seamen went on to argue that virtually the only benefits available to them from the State of Alaska were the protections and benefits they were afforded by the state when they were on shore in a strictly tourist or recreational capacity.

The Washington court was not persuaded by the arguments of its own residents. Ruling in favor of the State of Alaska, the Court held:

> We find no distinction between the business generated by the economic activities of Alaska accountable for the employment of nonresidents, whether it be on land or on the water within Alaskan boundaries. We are satisfied that the benefits of employment afforded by this economic activity of the state of Alaska constituted minimum connections within the rule to avoid a denial of due process under the 14th amendment to the United States Constitution.

418 P.2d at 759. Similar constitutional claims were rejected in Alaska Steamship Co. v. Mullaney, 180 F.2d 805 (9th Cir. 1950), and Sjong v. State of Alaska, 622 P.2d 967 (Alaska 1981).

In its Memorandum Opinion, the trial court herein noted that while working in Idaho, the trainmen are provided many benefits and protections by Idaho's state and local governmental structures. It is these protections which provide the trainmen the opportunity to exercise their intelligence, skill and labor while performing work for their employer within Idaho. In addition, it is these

same protections, i.e., the "fruits of civilization," which make it possible for Burlington Northern to operate its trains in Idaho, thus giving rise to the employment of Burlington Northern employees.

Burlington Northern employees attempt to dismiss the value of these services by asserting simply that they receive no more benefits than tourists who visit the state in a recreational capacity. The flawed reasoning underlying this argument becomes obvious when it is carried out to its logical conclusion. If the state must show that it provides the nonresident worker with benefits greater than those it provides tourists, it is unlikely that any nonresident employees within Idaho would be subject to income tax. It is the notion that the benefits afforded to the taxpayer by the state are related to the generation of income which provides the basis for the income tax. *See, Sjong v. State Department of Revenue,* 622 P.2d at 970-971. There is no requirement that the state must provide nonresident taxpayers exactly the same benefits and opportunities provided to its residents. American Commuters Association v. Levitt, 279 F.Supp. 40 (S.D.N.Y. 1967), aff'd, 405 F.2d 1148, 1153 (2nd Cir. 1969).

The only distinction between the employees in *Petronia* and the Burlington Northern employees here is that in *Petronia,* the ship stopped in Alaskan ports, whereas here, the trains make no stops in Idaho. However, the seamen performed no work related tasks while on shore. Their duties were limited to operating the vessels while at sea. The distinction is really one without a purpose. Both groups of employees are compensated for work performed while aboard a moving object. The real benefit received by both groups is the opportunity to

earn income within the respective states' borders. Perhaps *Petronia* and the instant case can be distinguished because ocean waters and railroad roadbeds have different specific gravities.

In short, the majority opinion proposes that total and complete physical presence within a state constitutes zero nexus. I have troubled to write because of the serious implications which will follow as to other cases if the rule of this case is taken seriously in the future.

Bearing in mind that income tax is levied, not upon where one sleeps or goes to church, but rather upon the taxable event of earning income within a jurisdiction, does the distinction that Wyoming trainmen who roll on Union Pacific tracks and wheels in southern Idaho make one Idaho stop, justify taxing them while Burlington Northern trainmen go tax free?

The majority opinion closes with the following inaccurate assessment of the state of affairs:

> If the due process clause allows Idaho to tax the income earned by the train crews while in Idaho, then we must be prepared to sustain taxes on the income earned by any person who crosses Idaho by any means without stopping or transacting business here, but who is being compensated while in transit. We are not prepared to say that the constitution permits taxation by the state in this fashion. There is not sufficient nexus to allow such a tax under either the due process clause or the commerce clause.

The silliness and conflict which would arise from such attempt to tax *de minimus* earnings has been obviated by

(1) Idaho Code Section 63-3027A;[3] (2) the multi-state compact[4] to which Idaho is a party; and (3) House Bill 655[5] which provides that no tax will be levied at all until earnings within the state reach a certain minimum level.

I regret my analysis lacks the persuasive power to deter my brothers from this dangerous and precedentless course – hopefully a comprehensive and artful petition for rehearing will cause a thoughtful revisitation of this case and its implications.

There is one thing to commend the majority opinion – it makes Idaho unique as the *only* state in the nation with no nexus over trainmen who labor within its borders and sleep elsewhere.

Idaho is already similar to a third-world nation in that outsiders extract its timber and minerals for manufacturing and processing elsewhere without paying a severance tax. The vision and perspective of this Court,

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[3] **Computing tax of part-year or nonresident individuals, trusts and estates.** – In computing the tax of a part-year or nonresident individual, trust or estate, the tax imposed by section 63-3024, Idaho Code, shall be reduced to the proportion that the adjusted gross income of the taxpayer from Idaho sources bears to the total adjusted gross income from all sources.

[4] The "multi-state tax compact" is codified in I.C. § 63-3701, to which twenty-two states are signatory.

[5] House Bill 655 of the 1988 Legislature enacted I.C. § 63-3023B, which provides that transportation employees earning less than one-half of their income from activities within the state will be exempted from income taxation. The fiscal note to that bill lists a fiscal impact of "approximately $250,000 to $500,000 per year." Since our judicial legislation herein is of even broader scope, it will have an immeasurably larger fiscal impact, when applied to not only transportation employees, but others similarly situated.

ignoring the principle that the making of tax policy is for the legislature, furthers Idaho's status as a third-world nation.

BISTLINE, J., concurs.

APPENDIX A

IN THE DISTRICT COURT OF THE
THIRTEENTH JUDICIAL DISTRICT OF THE
STATE OF MONTANA, IN AND FOR
THE COUNTY OF YELLOWSTONE

GLEN McNERNEY, et al., Non-Montana Resident, BURLINGTON NORTHERN RAILROAD Employees Performing Services in Montana,	)	No. DV-81-2195
Plaintiffs,	)	
-vs-	)	
THE STATE OF MONTANA DEPARTMENT OF REVENUE,	)	
Defendant.	)	

* * * * * * * * * * * * *

ORDER

(Filed Aug. 25, 1982)

The Parties herein having stipulated and agreed to a settlement in this matter and good cause appearing:

It is hereby ordered that the above-entitled action is dismissed with prejudice.

Dated this 24 day of August, 1982.

Robert H. Wilson
District Judge

IN THE DISTRICT COURT OF THE
THIRTEENTH JUDICIAL DISTRICT OF THE
STATE OF MONTANA, IN AND FOR
THE COUNTY OF YELLOWSTONE

GLEN McNERNEY, et al., Non-Montana Resident, BURLINGTON NORTHERN RAILROAD Employees Performing Services in Montana,	)	No. DV-81-2195
Plaintiffs,	)	
-vs-	)	
THE STATE OF MONTANA DEPARTMENT OF REVENUE	)	
Defendant.	)	

* * * * * * * * * *

CLOSING AGREEMENT AND SETTLEMENT COMPROMISE

THIS AGREEMENT made and entered into on the date below stated between Glen McNerney, et al., Burlington Northern Railroad Employees listed on Exhibit "A", who are residents of Washington and provide services in Montana (hereinafter referred to as "Employees") and Montana Department of Revenue (hereinafter referred to as "Department");

W I T N E S S E T H:

From January, 1978, up and through December of 1981, Employees performed services for their employer

within the State of Montana. At various times during this period, the Department notified the Employees that state taxes due Montana were unpaid and owing. Some or all of the Employees had not filed tax returns for 1978, 1979, 1980 and 1981, as required under the statutes of the State of Montana.

In October, 1981, a lawsuit was initiated by the Employees in the District Court, Yellowstone County, Montana, under Cause No. DV-81-2195.

The parties are entering into this Agreement in lieu of additional court proceedings under Cause No. DV-81-2195 based upon the following representations and understandings:

The parties ("Employees" and "Department") hereby stipulate and agree:

1. The Employees in the cause number mentioned above will pay Montana taxes for years 1978, 1979, 1980 and 1981.

2. Department will agree not to proceed now or in the future against Employees for any Montana taxes owing prior to 1978.

3. Travel and expense deductions incurred by the Employees will not be allowed as a deduction for tax years 1978, 1979, 1980 and 1981.

4. The Department will agree to review and recommend change of its rule of administrative procedure 42.16.1112, ARM, relating to travel and expense deductions applicable to nonresidents who file tax returns in Montana beginning with tax year 1982.

5. The tax returns for the four years mentioned above will be due October 15, 1982. No interest shall accrue for years 1978, 1979, 1980 and 1981. Beginning October 15, 1982, interest shall accrue at the statutory rate on unpaid balance of taxes. The Employees agree to pay one-third of the taxes for the four years mentioned above on October 15, 1982. There may be exceptions on a case-by-case basis for taxpayers who cannot afford such payment and who properly correspond with the Department. The first $100.00 of interest accruing from October 15, 1982, for each year per taxpayer shall be exempt.

6. The Employees shall pay the balance of tax owing (two-thirds) over a two-year period to be paid in quarterly installments. The first quarterly installment will be due December 31, 1982. These payments shall have a minimum balance of $100.00 unless the balance owing is less than $100.00 which amount shall then be due in full. Taxes paid shall first apply to oldest taxes owing.

7. Attached as Exhibit "B" and by reference incorporated herein is a list of individuals or groups the Department is currently actively pursuing to collect non-resident taxes owing.

8. Department will waive all penalties and late filing charges for the Employees for tax years 1978, 1979, 1980 and 1981. If any Employee should be delinquent in the quarterly installment owing, Department has the option, on a case-by-case basis, to institute penalties and late filing charges for 1978, 1979, 1980 and 1981. Date of payment of taxes will be deemed to be the date said payment is mailed.

9. Extensions may be granted by the Department on a case-by-case basis for good cause shown.

10. The pending litigation, being Cause No. DV-81-2195 in the District Court, Yellowstone County, Montana, shall be forthwith dismissed with prejudice and without costs.

DATED this 26 day of July, 1982.

DEPARTMENT OF REVENUE
Mitchell Building
Helena, Montana 59620

/s/ Ellen Feaver
ELLEN FEAVER, Director

/s/ R. Bruce McGinnis
R. BRUCE McGINNIS
Tax Counsel

/s/ Glen McNerney
GLEN McNERNEY

RICHTER, WIMBERLEY
and ERICSON, P.S.

By /s/ Gary D. Brajcich
GARY D. BRAJCICH

By /s/ Thomas L. Doran
THOMAS L. DORAN

Attorneys for Plaintiffs

BISTLINE, J., specially concurring in dissent of Huntley, J.

The opinion authored by Justice Huntley and the oral arguments in this case telling of high speed trains whizzing through Idaho without stopping, have reminded me of my terms in the office of prosecuting attorney of Bonner County and Boundary County. Both Burlington lines (formerly Great Northern and Northern Pacific) ran through one or both counties. It was always generally understood that the personnel on those trains – this was back in the days of passenger trains, club cars, buffet cars, and dining cars – were subject to the laws of Idaho while in Idaho, and accordingly no liquor or beer was sold while the trains traversed the panhandle. If westbound train personnel sold drinks on leaving Thompson Falls or Libby, Montana, and if personnel on trains eastbound out of Spokane, Washington, sold drinks before crossing the Idaho state line, there was no violation of the law in the drinking of the drinks as the trains moved swiftly through Idaho. So it was understood, or at least so I understood then, and recollect now.

Accordingly, the Great Northern and the Northern Pacific did not go to the bother and expense of buying Idaho liquor licenses. Not only was a state license required if they chose to sell in Idaho, ch. 274, sec. 6, 1947 Sess. Laws, with the license, or duplicate thereof, having to be posted in the buffet, dining, or club cars, but county, city, or village licenses had to be acquired, for a license fee, of course. *Id.*, sec. 16. Bartenders also had to meet certain requirements, and be bonded in the amount of $1000. *Id.*, sec. 22, sec. 22A. Days and hours of permissible sale were set. *Id.*, sec. 25. State, county, and village

officers had the right to examine premises where liquor was sold at any time. *Id.*, sec. 28. Prosecuting attorneys, sheriffs, and all other county, city, and village officers were placed under an obligation – under penalty of being removed from office for failure to comply – to inform against and punish any violations of the liquor law. *Id.*, sec. 33. A railroad company or bartender selling in Idaho without an Idaho license was subjected to a fine of $1000, plus one to five years of imprisonment. *Id.*, sec. 35.

Some of these statutes may have been since amended, but for the most part are nearly the same. I.C., Title 23, Ch. 9.

Sheriff Don Maynard and I discussed our obligation to ride those trains from time to time, but it would have meant traveling to Spokane or the two last Montana stops to get aboard – and no getting off. Moreover, it would not have been reasonable for the railroad companies to have gone to the bother of purchasing state of Idaho licenses plus county and city or village licenses. There very well may have been violations by a bartender selling drinks while the trains were in Idaho, knowing full well that those in authority would not go to the trouble of investigating. If a drink was sold on a train while in Idaho it would have been an inadvertence on the part of a newly employed bartender who didn't know when he was in or out of Idaho. Whatever may or may not have been taking place, the bartenders were, while in Idaho, subject to Idaho law providing for fine or imprisonment – or both – if the law was broken.

Having lived in Bonner and Boundary counties for a quarter of a century, I feel relatively safe in stating that

the non-stop trains going through those counties travel over the same tracks as do the locals. Upon that predicate it can be also added that both through trains and locals encounter the same crossings where railroad tracks intersect state and county highways, and city streets as well. The law in Idaho since before statehood, R.S. 1887 Sec. 69098, has been that any conductor, engineer, brakeman, switchman, or other person having charge in whole or in part of any railroad car, locomotive or train, who willfully or negligently allows or causes the same to collide with another locomotive, car, or train, or with any other object or thing, resulting in death is punishable by imprisonment in Idaho for one to ten years. I.C. § 18-6001, as slightly amended in 1972.

Under the provisions of the next section, I.C. § 18-6002, it is a misdemeanor on the part of the engineer to omit to sound a bell or whistle at least 80 rods from a crossing. Similarly under I.C. § 18-6003, it is a misdemeanor for certain railroad personnel to be intoxicated on the job.

Clearly, railroad personnel on trains traveling through Idaho, whether a local or non-stop, have been required to conform to the laws of Idaho. Equally clear, through trains, unlike airplanes, have as a nexus a firm commitment to Mother Earth and the laws of this state. Equally clear, in times of disaster such as happened in the 1950's on the Northern Pacific between Careywood and Athol, in Bonner County, Idaho, the county's emergency people responded, and the local hospitals cared for the injured.

The Idaho legislatures have, since territorial days, resolved the issue presented by declaring that railroad personnel in Idaho via trains on which they are employed are subject to criminal and civil provisions of Idaho law. If a distinction in the law has been drawn favoring those from Spokane who travel *through* on trains as against their fellow workers out on the *locals,* I am presently unable to grasp it. Nor am I able to fathom the justification for creating a distinction where the taxing authorities of this state are proceeding to treat equally the two classes of workers – only to be confronted by a barrier with flashing red lights.

HUNTLEY, J., concurs.

1988 Opinion No. 98.

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 16404

ROBERT F. BLANGERS, PATRICK R. BARTLESON, ROBERT J. TULLY, WALTER T. BARTHOLOMEW, WILLIAM M. RICHTER, RAYMOND H. REEDY, JAMES H. WEAVER and WALTER E. DUNLOP,
Plaintiffs-Appellants, Cross-Respondents,

v.

STATE OF IDAHO, DEPARTMENT OF TAXATION, IDAHO STATE TAX COMMISSION, COMMISSIONER LARRY G. LOONEY, COMMISSIONER CAROL M. DICK, COMMISSIONER MORGAN MUNGER AND COMMISSIONER DARWIN L. YOUNG, COMMISSIONERS OF STATE TAX COMMISSION, STATE OF IDAHO AND THE STATE OF IDAHO,
Defendants-Respondents, Cross-Appellants.

FILED: October 28, 1988

FREDERICK C. LYON, CLERK

Appeal from the District Court of the First Judicial District of the State of Idaho, Kootenai County. Hon. Watt E. Prather, District Judge.

ON DENIAL OF PETITION FOR REHEARING

JOHNSON, J.

NONRESIDENT INDIVIDUALS AS WELL AS MULTI-STATE CORPORATIONS ARE ENTITLED TO PROTECTION OF THE NEXUS REQUIREMENT.

In its petition for rehearing the Commission contends that the concept of nexus should not be applied in the same fashion to multi-state corporations and to nonresident individuals. We are said to have erred in looking to principles of nexus developed in cases dealing with multi-state corporations in determining whether a sufficient nexus existed in this case to justify the imposition of income taxes on the train crews. This contention suggests that individuals are not entitled to the same protection of the nexus requirement as corporations are under the due process clause and the commerce clause.

Nonresident individuals do not have fewer rights than multi-state corporations do under the due process clause and the commerce clause. In Shaffer v. Carter, 252 U.S. 37 (1920), the Supreme Court evaluated the rights of an individual under the due process clause and the commerce clause. There is no indication in the opinion of the Court that the result would have been different if the taxpayer had been a corporation. In a companion case decided on the same day the Court upheld a state income tax on the income of a multi-state corporation. Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920). The opinion in each case referred to the other. No distinction was made between the individual nonresident in *Schaffer* and the corporate nonresident in *Travis*. The same principles were

applied in determining whether the respective states could tax the incomes of the individual and the corporation.

The decisions of other states also indicate there are no fewer rights for nonresidential individuals than there are for multi-state corporations in matters of taxation. In State of Alaska v. Petronia, 418 P.2d 755 (Alaska [sic, Wash.] 1966) and Sjong v. State, Department of Revenue, 622 P.2d 967 (Alaska 1981), both of which were cited by the Commission, the Alaska Supreme Court dealt with the rights of individual nonresident taxpayers. In neither case did the court distinguish the rights of individuals from those of corporations under the due process clause and the commerce clause. In both cases the court went through an extensive analysis of the due process clause and the commerce clause, citing many leading cases of the United States Supreme Court dealing with multi-state corporations. The same is true of the New Mexico Supreme Court in Lung v. O'Chesky, 617 P.2d 1317 (N.M. 1980), also cited by the Commission.

Nexus is a threshold test in due process and commerce clause state taxation cases that applies to both individuals and corporations. Our task in this case is to determine the principles that have been developed in Supreme Court cases concerning the requirement of nexus and to apply those principles to the facts here. It is not "shoehorning" to use the concept of nexus developed in the multi-state corporation cases in deciding a case that involves nonresident individuals. This is merely the necessary process of reasoning from established legal principles in deciding a case where there is no controlling precedent.

It is true that a multi-state corporation is a fictitious entity that, through its agents and employees, can be present in more than one state at a time, while an individual can be in only one state at any moment. This fact does not render inapplicable the principles developed by the Supreme Court to determine whether the nexus between the train crews and Idaho is sufficient to allow Idaho to impose an income tax on these nonresident individuals. Presence in a state is only one of the factors that the Supreme Court has weighed in determining whether a corporation is subject to state taxation. If presence alone were sufficient, the whole concept of nexus would be unnecessary. Not just any nexus (connection) is sufficient to satisfy the Court's test. It must be a "substantial nexus." Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

The cases from other states dealing with taxation of nonresident individuals indicate that substantial nexus is a threshold test that is to be applied to individuals as well as to corporations. In *Petronia*, the Alaska [sic, Washington] court accepted the principle that before a state may levy a personal income tax upon a nonresident there must be "minimum connections between the nonresident and the taxing authority." 418 P.2d at 758. In doing so the court referred to the decisions of the Supreme Court in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) and Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1941). These were both cases involving multi-state corporations. After acknowledging the applicability of the minimum connections test to individuals, the Alaska [sic, Washington] court concluded that the wages earned by individual seamen while they were in Alaskan

waters was the most significant benefit they received from the state. The court pointed out:

> The business productivity generated by Alaska was accountable for the wages earned by the [seamen] when they were in Alaskan waters. . . . We find no distinction between *business generated by the economic activities of Alaska* accountable for the employment of nonresidents whether it be on land or on the water within the Alaskan boundaries. We are satisfied that the *benefits of employment afforded by this economic activity* of the state of Alaska constituted minimum connections within the rule to avoid a denial of due process under the Fourteenth Amendment to the United States Constitution.

418 P.2d at 758-59 (Emphasis added).

If the presence of the seamen without more would have satisfied the minimum connections requirement, the Alaska [sic, Washington] court would not have found it necessary to find another connection. If the earning of wages alone would have satisfied the minimum connections requirement, the Alaska [sic, Washington] court would not have found it necessary to have tied those wages to the "business generated by the economic activities of Alaska" and the "benefits of employment afforded by this economic activity of the state of Alaska."

In *Sjong*, the Alaska court dealt with a case in which Alaska had asserted an income tax against a nonresident individual who caught crabs outside of Alaska in international waters and then sold the crabs in Alaska. After recognizing the applicability of the minimum connections or substantial nexus requirement, the court concluded that "even though Sjong fishes in international waters, the activities of the state have a substantial effect on his

activities" and that the crab industry "has been fostered by the policies of the state and protected by its various police powers." 622 P.2d at 971. If mere presence in the state were sufficient, these additional rationales would not have been necessary to support a finding of the required minimum connections or substantial nexus.

PUSHING AND PULLING A THROTTLE DOES NOT CREATE A SUBSTANTIAL NEXUS.

In his opinion on denial of petition for rehearing, Justice Huntley poses the conundrum that the physical phenomenon of an engineer pushing and pulling a train's throttle while the train is traveling through Idaho cannot truly be transformed into "throttle pushing and pulling" in Washington or Montana. The implication is that the majority opinion ignores the "substantial nexus" of an engineer's pushing and pulling a throttle in Idaho and attempts to transmigrate this activity to our sister states. The answer to this purported puzzle is that it depends upon the circumstances in which the engineer is pushing or pulling a throttle whether it will be deemed to be a "substanital nexus," subjecting the engineer's income for doing so to tax in Idaho. If the engineer were a resident of Idaho or were pushing or pulling the throttle while involved in employment that was generated by the economic activity of Idaho, a substantial nexus would exist. When the engineer is a nonresident and pushes or pulls the throttle while driving a transcontinental train across Idaho without engaging in any activity generated by the economy of Idaho, there is not a substantial nexus. Other factual situations will require further interpretations of what constitutes substantial nexus. It is not appropriate

for us to prejudge those cases here. It is sufficient for us to decide this case and to state our rationale.

The Commission argues that while the train crews are working in Idaho they are receiving the benefits of Idaho's organized society and should therefore be subject to Idaho income taxes. The Commission cites Justice Huntley's dissent for the contentions that the train crews are provided the benefits of Idaho's state and local governmental structures and the opportunity to exercise their intelligence, skill and labor while performing work for their employer within Idaho. It is these "fruits of civilization," the Commission argues, that make it possible for BN to operate its trains in Idaho, thus giving rise to the employment of the train crews.

The concept that taxes are what we pay for the fruits of civilization has been attributed to Justice Oliver Wendell Holmes. Wisconsin v. J.C. Penney, 311 U.S. at 466. What Justice Holmes said was: "Taxes are what we pay for civilized society, ..." Compania General de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927) (Holmes, dissenting). In that case Holmes said that he could see no ground for denying the right of the Philippine Islands to tax insurance premiums paid by a Spanish company to a London insurer to insure merchandise stored in the Philippines, "unless it can be shown that it has conferred no benefit of a kind that would justify the tax." *Id.* He then pointed out that "the government of the Islands was protecting the property at the very moment in respect of which it levied the tax." *Id.* at 101. This makes it clear that Holmes did not rely on a nebulous concept of "fruits of civilization," but rather embodied in that concept the idea that the taxpayer must

have received some benefit from the governmental unit imposing the tax.

In *J. C. Penney*, the Supreme Court in upholding a corporate income tax on earnings attributable to activities in Wisconsin pointed out that "the incidence of the tax as well as its measure is tied to the earnings which the State of Wisconsin has made possible, insofar as government is the prerequisite for the fruits of civilization." 311 U.S. at 446. The fruits of civilization in that case included the permission of Wisconsin for J. C. Penney Co., a Delaware corporation having its principal offices in New York, to carry on business in Wisconsin. Here there is no comparable situation. The train crews did not have to obtain permission of Idaho to be employed by BN on the through transcontinental trains passing through Idaho. Saying that the train crews benefited from the fruits of civilization in Idaho when they were passing through amounts to nothing more than saying that they were present here. Mere presence in a state does not fulfill the requirement of substantial nexus.

In *Lung v. O'Chesky*, the New Mexico Supreme Court upheld the power of the state to tax income of Texas residents who were employed on the White Sands Missile Range, a federal enclave. The court noted that the power to tax rests on the benefits of the "fruits of society" and the "opportunity to exercise 'intelligence, skill, and labor while employed in the State of New Mexico.' " 617 P.2d at 1319. It is apparent that the employees of the missile range traveled from Texas to New Mexico and remained there to carry out their work. They were not merely passing through the state as the train crews were in this

case. In any event, to the extent that *Lung* is contrary to our decision here, we decline to accept its logic.

The Commission argues that if BN were unable to operate its trains in Idaho, it would be unable to provide the jobs from which the trains crews receive their wages. It is the opportunity to be employed, says the Commission, that constitutes sufficient nexus for the state to tax the wages of the train crews. This opportunity is apparently the "fruit of civilization" in Idaho that the train crews are asserted to enjoy while passing through the state. This argument overlooks the fact that the train crews did not obtain their employment in Idaho, but in Washington. Their opportunity for employment arose there. They entered upon their employment in Washington and traveled between Washington and Montana in the course of their employment. The fact that in the course of their employment they traveled through Idaho is purely coincidental. Nothing in Idaho provided them with the opportunity for their employment. Their only connection with this state is that the trains on which they were employed traveled through the state. Neither BN nor the train crews transacted any business in Idaho during these trips. The relationship of the trains crews was with BN, not with Idaho. The fact that they were paid for duties they performed on the trains while the trains were traveling through Idaho does not amount to their benefiting from the fruits of civilization in Idaho. Idaho did not provide them with the opportunity for employment; only BN provided them with that opportunity.

One can imagine a number of circumstances in which nonresident individuals who have been employed outside the state travel across Idaho during the course of

their employment. For example, a bank executive from Denver may fly regularly between Denver and Seattle, passing over Idaho on each trip. By the logic of the Commission, this executive would be required to pay Idaho income tax while traveling across Idaho. Idaho would apparently have provided this executive with the fruits of its civilization for which it was entitled to payment. No case has been cited that would subject this banker to income taxation by Idaho, merely because of invasion of our air space. There is no authority for doing so. If the Denver executive traveling to Seattle by airplane is not subject to Idaho income tax, should the same executive be subject to Idaho income tax because he chooses to travel through Idaho by train, by bus, or by private automobile instead of by airplane. If the Denver executive is not subject to Idaho income tax while traveling through Idaho, the Commission does not offer any rationale why the train crews should be subject to income tax while traveling through Idaho. Perhaps it is because throttle pushing and pulling is not as exempt from taxation as pencil pushing and pulling. I am not prepared to premise a constitutional distinction on such an anti-egalitarian construct.

THE "DE MINIMIS" PROVISIONS OF I.C. §§ 63-3030 AND 63-3023B ARE IRRELEVANT TO THE ISSUE OF NEXUS IN THIS CASE.

The Commission argues that I.C. Sec. 63-3030 establishes a *"de minimis"* provision that removes any perceived unconstitutionality of the tax on the income of the train crews earned while they are traveling through Idaho. This statute currently provides that a nonresident

individual is not required to file an income tax return in Idaho unless the gross income of the individual from Idaho sources exceeds (1) $3,300, if unmarried and not a surviving spouse, (2) $4,400, if a surviving spouse, or (3) $5,400, if entitled to make a joint return. The Commission also invokes the 1988 enactment of the Idaho legislature now codified in I.C. Sec. 63-3023B, effective retroactively to January 1, 1988. This new statute exempts a nonresident individual from filing an Idaho income tax return or paying Idaho income taxes, if the individual:

> (a) Is an employee of a railroad or motor carrier; and
> (b) Performs regularly assigned duties in the course of such employment aboard a train or motor vehicle in this state and at least one (1) other state of the United States; and
> (c) Earns less than one-half(1/2) of his income from employment aboard a train or motor vehicle as a result of activities in this state; and
> (d) Earns no other income from sources within this state; and
> (e) Is, during the entire taxable year, a resident of a state which does not impose on individuals a tax, measured by net income, or which grants to Idaho residents an exemption from tax similar to that granted in this section.

I.C. Sec. 63-3023B (1988).

De minimis is a concept derived from the legal maxim, *"De minimis non curat lex"* (the law does not concern itself with trifles). Crosby v. Rowand Machinery Co., 111 Idaho 939, 944, 729 P.2d 414, 419 (Idaho App. 1986). What is a "trifle" is apparently a very flexible concept in the view of the Commission. When I.C. Sec. 63-3030 was enacted in 1959, it was $600. More recently, it has been $3,300, $4,400, or $5,400, depending on the

status of the individual. For transportation workers traveling through Idaho it may now be up to one-half of the income they earn during their sojourn through the state. Tomorrow it may be some other amount, or zero, depending on the policy enacted by the legislature.

None of these formulations is relevant to the determination of whether there is substantial nexus as required by the due process clause and the commerce clause. Nexus is concerned primarily with the quality of the connections an individual or business entity has with a state, not with the quantity of the individual's or entity's income. "Minimum connections" does not mean minimum income.

THE COMMERCE CLAUSE PROTECTS INDIVIDUALS WHO ENGAGE IN OCCUPATIONS THAT CAUSE THEM TO CROSS STATE BOUNDARIES.

The Commission contends that the commerce clause is not applicable to this case because there is no sale of goods or transportation services. The Commission would restrict "commerce" to transactions involving sales. This concept of commerce is archaic. As the Supreme Court said in Jordan v. Tashiro, 278 U.S. 123, 127-28, 49 S.Ct. 47, 48 (1928):

> While in a narrow and restricted sense the terms "commerce," or "commercial," and "trade" may be limited to the purchase and sale or exchange of goods and commodities, they may connote, as well, other occupations and other recognized forms of business enterprise which do not necessarily involve trading in merchandise. [Citation omitted.] And although commerce includes traffic in this narrower

sense, for more than a century it has been judicially recognized that in a broad sense it embraces every phase of commercial and business activity and intercourse. See Gibbons v. Ogden, 9 Wheat. 1, 6 L.Ed. 23.

The train crews worked across state boundaries and were involved in interstate commerce. They are entitled to the protection of the commerce clause, the same as if they sold goods or transportation services.

SHEPARD, C.J. and BAKES, J., concur.

BISTLINE, J., ON DENIAL OF PETITION FOR REHEARING.

With the Court's May 24, 1988, opinion in its hands, the Tax Commission has asked that a rehearing be granted in order that on reconsideration the Court would modify its opinion and hold that the Idaho Income Tax Act, insofar as it imposes a tax on the income of train crew members working on trains while traveling through Idaho, does not violate the due process clause of the fourteenth amendment or the commerce clause (art. I, § 8, cl. 3) of the United States Constitution; and, if not, that in any case the Tax Commission requests that the Court clarify its original opinion and articulate the standard to be employed by the commission in administering the tax law when questions of nexus arise.

The Tax Commission's brief asserts that the rehearing is requested because the opinion of the Court, filed May 25, 1988, is the first ruling by any court of any jurisdiction to hold that a state's attempt to tax a nonresident individual performing labor within that state violates the due process clause of the fourteenth amendment and the commerce clause (art. I, § 8, cl. 3) of the United States Constitution.

The brief points to four areas in which it asserts that the Court has gone astray:

First, the opinion relies upon nexus concepts dealing with fictional entities, i.e., corporations, to achieve a tortured, and completely untenable result which provides no reasoning or guidance to either taxpayers or the Tax Commission.

Second, the opinion fails to consider Idaho Code § 63-3030 which provides that no tax shall be levied on nonresidents until the total Idaho source income exceeds specified minimum levels. Consideration of this "de minimis" statute would eliminate this Court's fear of "sustaining taxes on the income generated by any person who crosses Idaho by any means without stopping or transacting business here, but who is being compensated while in transit." 1988 Opinion No. 39, at 14.

Third, the opinion misconstrues the requirement of "economic contact" necessary to sustain nexus under the due process clause for a nonresident individual based on a state's provision of the "fruits of civilization." Idaho has provided the protections and business climate which are necessary for these employees to receive the substantial benefit of employment within the state.

Fourth, the commerce clause cannot be violated on the present facts because there are no "goods in transit" or "interstate sales." The tax at issue is not levied on "goods in transit" or "interstate sales," but rather on the income generated from the labor of the train crews while in Idaho.

Fifteen pages of discussion appear to sustain the propositions so advanced. In my view the Court is remiss in not affording the Tax Commission the opportunity to

further pursue its contentions at a rehearing, and I have voted to do so.

HUNTLEY, J. ON DENIAL OF PETITION FOR REHEARING

A state income tax is a tax imposed on income earned from labor performed within a state. All states under all prior federal and state decisions, have the power to tax income earned in the state.

If through the use of legal constructs and through use of the word "nexus," the physical phenomenon of an engineer pushing and pulling on a train's throttle while the train is traveling through Idaho can truly be transformed into performance of labor in Washington or Montana, then what the majority has written is a correct legal analysis.

If, on the other hand, performance of work in Idaho is performance of work in Idaho, then I must differ with the legal analysis.

The excellent, cogent and thoughtful brief on Petition for Rehearing by the Attorney General, which I attach hereto as Appendix A, may give the reader an opportunity to better evaluate which position is correct.

At the moment, the following forty states have laws providing for the taxation of individual earned income:

Alabama
Arizona
Arkansas
California
Colorado
Delaware
Georgia
Hawaii
Idaho
Illinois

Indiana
Iowa
Kansas
Kentucky
Louisiana
Maine
Maryland
Massachusetts
Michigan
Minnesota
Mississippi
Missouri
Montana
Nebraska
New Jersey
New Mexico
New York
North Carolina
North Dakota
Ohio
Oklahoma
Oregon
Pennsylvania
Rhode Island
South Carolina
Utah
Vermont
Virginia
West Virginia
Wisconsin

All have a statute similar to Idaho Code § 63-3024 imposing a tax on non-resident labor within a state. Not one single case holds that any of those forty states lack the power to tax non-residents who pursue their occupations while transiting the state.

The majority appears to have been impressed by an argument presented by the trainmen that to tax them, would mean that the next step might be a tax on the wages of airline pilots or airline passengers such as bankers who perform work while transiting the state of Idaho on a transcontinental flight. To the majority such would appear to be a conceptually unwarranted exercise of the taxing power. However, the fact is, that the states do have the power to so tax, but do not exercise it due to the onerous bookkeeping expense which would be involved both for the state and the taxpayer and, thus, they handle that problem through their *"de minimis"* statutes such as I.C. § 63-3030. No case has ever held that that banker or airline pilot is not subject to taxation and there is no good reason why, when computer processing

makes such calculations economical, the airline pilot earning $100,000 a year should escape taxation on his income while the ground crews working to make the flight possible are subject to income taxation.

I am most distressed by what I believe is the majority's incorrect grounding of its opinion on the Interstate Commerce Clause. Just as the interstate commerce clause is not implicated as an "undue burden on the airline" by taxing the wages of a man who lives near St. Anthony, Idaho, who works on the air traffic control radar on Sawtelle peak, neither would the commerce clause be implicated by an income tax requiring the airline pilot who flies for only six minutes of a transcontinental flight in the air space of the District of Columbia to pay a fair proportion of income tax to the states he flies over in route to thirty-five minutes in California air space while landing in San Francisco.

One final example demonstrates the reason why no other court has ever misconstrued the commerce clause to limit a state's power to tax in cases of this nature:

(1) A B.N. engineer resident on the Idaho side of the border who commutes to Spokane to board his train for the trip back across Idaho to Montana, pays his Idaho income tax with the majority agreeing his tax payment does not "burden commerce."

(2) Why then, would payment of the same proportionate tax by an engineer resident in Spokane suddenly constitute an unconstitutional burden?

The opinion on denial by Justice Johnson contains the following sentence.

"Neither B.N. nor the train crews transacted any business in Idaho during these trips."

I suggest that the train crew members did in fact transact their business of operating the trains in Idaho and, therein, the majority recognizes the proper test, but regrettably fails to follow where its logic leads. When a person is physically present performing his work in Idaho, Idaho possesses the total, ultimate and absolute nexus.

The statement that "[n]either *B.N.* nor the train crews transacted any *business* in Idaho during these trips" displays the flawed analysis in two other respects.

(1) In determining income tax incidence upon an individual, the nature of the employer's business is usually of little relevance and serves only to confuse the majority analysis in the instance.

(2) Secondly, it seems to me that business of the Burlington railroad is that of *transportation*. "Transportation is a derivative of the Latin word "trans" (across) and the French word "portare" (to carry). It would seem to me that B.N.'s business of carrying goods and people across Idaho is business in Idaho rather than in Washington or Montana. Further, as to the source of the fruits of civilization which make the enterprise possible, it seems to me that while the train crosses Idaho, it is the terra firma of Idaho, the section hands of Idaho, the traffic signal maintenance crews of Idaho, and the police and fire protection provided by Idaho people which contribute more to the transportation enterprise than do the similar support forces many miles away in other states.

APPENDIX A TO OPINION OF JUSTICE HUNTLEY ATTORNEY GENERAL BRIEF ON PETITION FOR REHEARING

Rehearing is requested in this case because the Opinion of this Court, filed May 25, 1988, is the first ruling by any court of any jurisdiction to hold that a state's attempt to tax a nonresident individual performing labor within that state violates the Due Process Clause of the Fourteenth Amendment and the Commerce Clause (Art. I, § 8, cl.3) of the United States Constitution.

Initially, the Opinion relies upon nexus concepts dealing with fictional entities, i.e., corporations, to achieve a tortured, and completely untenable result which provides no reasoning or guidance to either taxpayers or the Tax Commission.

Second, the Opinion fails to consider Idaho Code § 63-3030 which provides that no tax shall be levied on nonresidents until the total Idaho source income exceeds specified minimum levels. Consideration of this "de minimis" statute would eliminate this Court's fear of "sustain[ing] taxes on the income generated by any person who crosses Idaho by any means without stopping or transacting business here, but who is being compensated while in transit." 1988 Opinion No. 39, at 14.

Third, the Opinion misconstrues the requirement of "economic contact" necessary to sustain nexus under the Due Process Clause for a nonresident individual based on a state's provision of the "fruits of civilization." Idaho has provided the protections and business climate which

are necessary for these employees to receive the substantial benefit of employment within the state.

Fourth, the Commerce Clause cannot be violated on the present facts because there are no "goods in transit" or "interstate sales." The tax at issue is not levied on "goods in transit" or "interstate sales," but rather on the income generated from the labor of the train crews while in Idaho.

I.

THE COURT RELIED UPON NEXUS CONCEPTS DEALING WITH FICTIONAL ENTITIES TO ACHIEVE A TORTURED AND COMPLETELY UNTENABLE RESULT WHICH PROVIDES NO REASONING OR GUIDANCE TO EITHER TAXPAYERS OR THE TAX COMMISSION.

The United States Supreme Court has held that a state may impose a tax on incomes earned by nonresident individuals from their occupations carried on within the state. *Shaffer v. Carter,* 252 U.S. 37, 52 (1920). In upholding the income tax on a nonresident individual, the court in *Shaffer* reasoned that the states have the general duty of protecting and preserving "all persons, property, and business transactions within their borders . . . " *Id.* at 50. As a consequence of these protections, the state has a right to demand a contribution in the form of taxes from those who profit from the protections provided by the state. *Id.* In reinforcing this principle, the court stated:

> That the state, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for

> the support of the government, is a provision so wholly inconsistent with fundamental principles as to be refuted by its mere statement.

Id.

The United States Supreme Court has also mandated " . . . that there be a sufficient nexus between the presence, property or activities of the nonresident and the state attempting to impose the tax in order to survive a challenge under the due process clause. . . ." 1988 Opinion No. 39, at 7. However, the Opinion in this case relies upon concepts pertaining to nexus announced in numerous United States Supreme Court decisions dealing with the fictional entity of corporations (in particular, foreign corporations operating in multiple states) in an attempt to determine whether a nonresident individual performing labor within Idaho has a sufficient connection with Idaho to be subject to its income tax. In announcing the result of this case, the Court fails to formulate a general test applicable to future cases or to set forth its reasoning behind the result. Perhaps the reasoning is omitted because it is based on the structural defect of shoehorning corporate nexus principles into individual nexus principles.

The distinctions between a corporation and an individual with regard to the concept of nexus are paramount. A corporation, by definition, is a fictional entity which can act only through its officers or agents. Further, a corporation can have a "presence" in more than one state at any given moment, i.e., a multi-state corporation. An individual, on the other hand, can be in only one place at one time. When an individual is working in state A, he cannot be working simultaneously in state B. Thus,

an individual performing labor or personal services within a state, receiving income thereby, has derived that income from sources within said state. *Gee v. West*, 90 Idaho 173, 409 P.2d 116 (1965). This Court so stated at page 5 of its Opinion: "where compensation for personal services is involved, the source of income is the location where the services are performed."

Therefore, the Court erred in looking to principles of nexus dealing with corporations, particularly multi-state corporations, to determine whether or not an individual with complete physical presence in Idaho has a sufficient "presence" in Idaho to support a finding of nexus.

II.

THE COURT'S FEAR OF THE STATE TAXING "ANY PERSON WHO CROSSES IDAHO BY ANY MEANS WITHOUT STOPPING OR TRANSACTING BUSINESS HERE, BUT WHO IS BEING COMPENSATED WHILE IN TRANSIT" IS WITHOUT FOUNDATION.

Idaho Code § 63-3030 sets forth the minimum amount of income a nonresident individual must earn from Idaho sources before an income tax can be levied, i.e., a "de minimis" provision. Idaho Code § 63-3030 has been part of the income tax act since its enactment in 1959, and has been periodically amended to increase the minimum income that a taxpayer must earn prior to being subject to a filing obligation. In addition, House Bill 655 of the 1988 Legislature enacting Idaho Code § 63-3023B sets forth *further* limitations specifically aimed at transportation employees.

As enacted in 1959, the de minimis provision provided that a nonresident individual could earn income

from Idaho sources of up to $600 before a tax reporting obligation would occur. Currently, a nonresident single individual must have income from Idaho sources amounting to at least $3,300 before a tax reporting obligation occurs. A nonresident individual filing a joint return must earn at least $5,400 from Idaho sources before a tax reporting obligation occurs. Thus, a nonresident individual crossing Idaho and being compensated while in transit would not be subject to Idaho tax until his income from Idaho sources is substantial enough to exceed the statutory minimum.

De minimis provisions with regard to the Due Process Clause were specifically addressed in the case of *Commonwealth, Dept. of Taxation v. B.J. McAdams, Inc.*, 317 S.E. 2d 788 (Va. 1984). There, the Supreme Court of Virginia stated that a "de minimis" provision was added to the taxation scheme " [i]n order to conform to the Due Process requirements of the Fourteenth Amendment to the Federal Constitution. . . ." *Id.* at 792.

What must be remembered is that the train crews in question are not "merely passing through Idaho" on a sporadic or inconsistent basis. Quite the opposite is true. The train crews are passing through Idaho on a regular and systematic basis. Depending upon whether a time or mileage apportionment factor is used, between 25% and 40% of the wages earned by the train crew members are being earned while they are in Idaho.

As an example of the presence necessary in Idaho to meet the current minimum filing requirements, if a train crew member (filing single) earned $60,000 a year, and a bare minimum 25% apportionment factor was used, the

train crew member would be able to work continuously across Idaho for well over 2 months prior to incurring any Idaho tax liability. Using the same facts, a train crew member filing jointly could work continuously across Idaho for over a third of the year prior to incurring any Idaho tax liability.

A second example to be considered is the distinction between the engineer operating a through train that does not stop, as opposed to a second engineer operating a train that makes one momentary stop, but who never moves from his seat and then continues on his journey through the state. The Opinion of this Court implies that one stop is sufficient to tax the second engineer, yet the first goes tax free. Because the Court failed to set forth its reasoning behind the result, the Tax Commission can only guess as to how this area of the law should be administered in the future.

During reargument, a question was raised concerning a banker riding on a train and working while crossing Idaho. The Court inquired, ignoring the de minimis statutes, how often the banker could work while traveling through Idaho before incurring an Idaho tax liability. Admittedly, an incomplete response was given.

To properly answer the question, it must be addressed both statutorily and in the due process context. Statutorily, as discussed earlier in this brief, any individual performing labor or personal services within the state has Idaho source income which is subject to Idaho income tax. *Gee v. West, supra.* Therefore, *any* wages received for labor performed within Idaho would be subject to income

tax under the taxing statutes, absent the de minimis provision. This response was given during reargument.

However, the de minimis provisions *cannot* be ignored in the due process context because that is what sets the floor to satisfy the minimum contacts necessary to support nexus. Without the de minimis provisions, a nonresident individual coming into Idaho to work for one day, thereby earning $100.00, would incur an Idaho income tax liability. Statutorily, it makes no difference if he digs a ditch or operates a through train. That individual has Idaho source income subject to Idaho's income tax.

On the other hand, *with* the de minimis provisions, the nonresident individual would not be subject to tax until such time as he earned sufficient income to exceed the minimum filing requirements, thereby meeting the minimum contacts necessary to satisfy the nexus requirement of the Due Process Clause. Again, it makes no difference if the individual digs a ditch or operates a through train. Due process requirements are satisfied if the nonresident individual has earned income from Idaho sources which meet or exceed the de minimis statutory filing requirements.

III.

THE COURT HAS MISCONSTRUED THE REQUIREMENT OF "ECONOMIC ACTIVITY WITHIN IDAHO" NECESSARY TO SUSTAIN NEXUS UNDER THE DUE PROCESS CLAUSE.

Although the Court correctly held that Idaho is the source of the income of the train crew members while

they are traveling through Idaho, the Court failed to recognize the contributions made by Idaho to the production of this income. In failing to recognize Idaho's contributions, the Court erred in holding that:

> the Idaho law imposing a tax on the income of these employees while they are traveling through Idaho violates the due process clause of the fourteenth amendment and the commerce clause (art. I § 8, c1. 3) of the United States Consitution.

1988 Opinion No. 39, at 2.

> The United States Supreme Court has stated:
>
> A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax *the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.*
>
> * * *
>
> The simple but controlling question is whether the state has given anything for which it can ask return. [Emphasis added.]

Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940). The Court cited the above language in its Opinion as the beginning step in determining nexus. However, the Court then went on to cite numerous United States Supreme Court decisions dealing with multistate corporate income tax or corporate sales tax situations which are completely inapposite to the facts of the present case. Further, the Opinion completely ignores the numerous decisions cited by the Tax Commission (discussed below) which deal specifically with economic contacts sufficient to sustain nexus between a nonresident *individual* and a taxing state. Even so, every single case cited by the Court in its

analysis of the nexus concept concluded that sufficient contacts *did* exist to satisfy due process requirements and to justify imposition of state taxes.

The Opinion of this Court states at page 13 that the wages of the train crew members " . . . are not attributable to any economic activity within Idaho, and that Idaho markets and commerce do not affect their income in any degree." This statement is inconsistent with applicable case law.

In *Lung v. O'Chesky*, 617 P.2d 1317 (N.M. 1980), New Mexico sought to tax residents of Texas who were employed on the federal enclave known as the White Sands Missile Range. The wages of the federal employees were in no way dependent upon New Mexico markets and commerce, nor were they attributable to any economic activity within New Mexico. Nevertheless, the Supreme Court of New Mexico held:

> *The power to tax does not rest on a measurable economic duty of the State towards its citizens, but on less tangible benefits, on the "fruits of civilization". J.C. Penney Co.*, [311 U.S.] at 446, 61 S.Ct. at 250, quoting *Compania de Tobacos v. Collector*, 275 U.S. 87, 100, 48 S.Ct. 100, 105, 72 L.Ed. 177 (1927) (Holmes, J., dissenting). The *opportunity* to exercise "intelligence, skill, and labor while employed in the State of New Mexico" has been held to be sufficient benefit to support an income tax. *Jackling v. State Tax Commission*, 40 N.M. 241, 248, 58 P.2d 1167, 1171 (1936). Under this test, plaintiffs have a sufficient nexus with New Mexico to be taxed. [Emphasis added.]

Id. at 1319. Clearly, the New Mexico Supreme Court held that the *opportunity* of employment within the state was

sufficient, without regard to whether or not the employment was dependent upon New Mexico markets and commerce, or any economic activity within New Mexico.

In *Sjong v. State, Dept. of Revenue*, 622 P.2d 967 (Alaska 1981), the Supreme Court of Alaska also looked at the minimum connection of a nonresident individual sufficient to satisfy due process requirements. In *Sjong*, the court looked to indirect benefits of economic activity as well as direct benefits of economic activity within a state. The court looked to "business income generation" to determine:

> that unlike the services rendered to an ordinary traveler, the services, benefits, and protections offered to Sjong are directly related to generating his income. . . . the availability of emergency medical services, [and] repair facilities . . . clearly benefits his business operations. . . .

Id. at 970. The *Sjong* court cited the case of *State of Alaska v. Petronia*, 418 P.2d 755, 759 (Wash. 1966), in support of its business income generation concept by quoting:

> "We are satisfied that the *benefits of employment* afforded by this economic activity of the state of Alaska constituted minimum connections within the rule to avoid a denial of due process under the Fourteenth Amendment to the United States Constitution." [Emphasis added.]

Id. at 971. This principle is completely opposite to the one stated by this Court in its reading of the *Petronia* case.

The economic activity in *Petronia* ran between the state and the employer of the defendants therein. In turn, the employer was able to offer the benefit of employment to the nonresident seamen. Thus, the *Petronia* court, in

rejecting the defendants' (employees') argument that they had not received a benefit from the state, held:

> [the argument] overlooks a most significant element considered in applying the test of benefits in determining minimum connections. Probably the most significant benefits in the eyes of these defendant seamen are the wages they contemplated receiving for their services during the course of the vessel's voyage. *The business productivity generated by Alaska was account..ble for the wages earned by the defendants* when they were in Alaska waters. [Emphasis added.]

418 P.2d at 758.

Although the Court cited the above language in its Opinion at page 14, with regard to the "importance of the economic activity generated by the state" (1988 Opinion No. 39, at 13-14), the Court misconstrued the requirement of "economic contact" by failing to recognize that the employer providing the wages is sufficient to meet the nexus requirement of due process.

The Court's Opinion also states at page 13:

> It would be unfair to allow the state to impose a tax on the income of the train crews earned while they are merely passing through Idaho.

However, the train crew members are not "merely passing through Idaho". This was clearly pointed out in the trial court's memorandum opinion at page 25-26:

> while operating the train in Idaho the plaintiffs [train crew members] are performing their duties carefully and diligently to preserve and protect their own safety and preserve and protect the safety and security of persons on or near the railroad track and to preserve and protect the extremely valuable equipment and cargo entrusted to their care.

The presence of the train crew members within Idaho is not incidental to the performance of the labor being compensated. The train crew members are being paid to use their skill, intelligence and labor to safely and timely negotiate the train and its contents from Washington, through Idaho, to its destination in Montana, and vice-versa. This skill, intelligence and labor is not turned off upon reaching the Washington-Idaho border and then turned back on upon reaching the Idaho-Montana border.

While the crew members are working in Idaho they are receiving the benefits of Idaho's organized society. As Justice Huntley points out in his dissent at page 24:

> the trainmen are provide many benefits and protections by Idaho's state and local governmental structures. It is these protections which provide the trainmen the opportunity to exercise their intelligence, skill and labor while performing work for their employer within Idaho. In addition, it is these same protections, i.e., the "fruits of civilization," which make it possible for Burlington Northern to operate its trains in Idaho, thus giving rise to the employment of Burlington Northern employees.

A very real example of the protections provided by Idaho's state and local governmental structures of which the train crew members benefit is the case of *People v. Williams*, 1 Idaho 85 (1866). On March 3, 1863, prior to statehood, the territory of Idaho was organized by Congress from four already existing territories, thus becoming a separate political community. Because the new territory was carved out of four existing territories, the usual practice of recognizing the laws of the former government until new laws could be adopted was not feasible. This left the new territory of Idaho with no crimina!

statutes until such could be enacted by the new government. The defendant, John Williams, was charged with committing the crime of highway robbery during the month of September, 1863, in the county of Boise, territory of Idaho. The court held that because the crime, assuming the facts alleged in the indictment to be true, was committed after the laws of the former territory were extinguished, but prior to the time new criminal statutes could be enacted, that:

> there was no statute punishing the offense charged in this indictment at the time it was alleged to have been committed, and that even if the facts alleged be true, no sentence could be pronounced.

Id. at 88. Therefore, prior to Idaho's existence, and the protections which we now take for granted, a person could commit highway robbery, or any other crime, with impunity.

It is exactly these benefits and protections which allow the train crew members to work within Idaho in a secure manner. For if Burlington Northern were unable to operate its trains in Idaho, it would be unable to provide the jobs, and thus the wages, that the train crew members receive. It is this *opportunity to be employed* which has been held to constitute sufficient nexus for the state to tax the wages of a nonresident individual performing labor within the states (sic) borders. *See, Sjong v. State Department of Revenue, supra; Lung v. O'Chesky, supra; State of Alaska v. Petronia, supra; Jackling v. State Tax Commission,* 58 P.2d 1167 (N.M. 1936).

IV.

AN INCOME TAX ON WAGES EARNED FROM IDAHO SOURCES BY NONRESIDENTS DOES NOT VIOLATE THE COMMERCE CLAUSE.

Although the Commerce Clause and Due Process Clause are often discussed interchangeably,

> [t]he courts, however, have usually placed considerations of minimum contacts and sufficient nexus under the due process heading, while questions regarding the proper apportionment of income to the taxing state and the discriminatory impact of taxes are covered by the Commerce Clause. [Citations omitted.]

Sjong v. State, Department of Revenue, 622 P.2d at 973. The United States Supreme Court has held that:

> net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same.

Northwestern States Portland Cement Company v. Minnesota, 358 U.S. 450, 452, 79 S.Ct. 357, 359, 3 L.Ed. 2d 421, 424 (1959). What must be kept in mind is that corporations can only earn income be selling the services of its employees or selling goods. This is because the fictional corporate entity is not a physical being capable of having a presence in a specific location. Thus, any time a corporation transacts business in more than one state, and thereby is subject to tax in more than one state, a potential Commerce Clause issue arises.

However, the Commerce Clause itself is inapplicable to the present case. There is no sale of goods. The train crew members are not paying a fee for the privilege of

being transported to a destination. There is not a sale of transportation services to the train crew members. The train crew members are not passengers, and should not be treated as such, despite the insistence of their counsel.

To the contrary, the train crew members are receiving wages in exchange for labor performed on the train. This distinction was emphasized in *Sjong* where the court stated:

> The main distinction between the instant case and the situation described in the *Petronia* case is that Petronia earned his income while employed on a vessel in Alaska waters. Here, Sjong catches crab outside of Alaska in international waters and then sells them within the state.

622 P.2d at 971.

The *Petronia* court summarized this principle by stating that an income tax:

> makes no attempt to interfere with or control the conduct of any business. It is not a privilege tax.
>
> * * *
>
> The instant tax is *not a direct tax upon interstate commerce* or the vessels engaged therein. *It is rather a tax upon the income derived therefrom,* properly proportioned so as to tax only that net income of seamen which is earned within the jurisdiction of Alaska. [Emphasis added.]

418 P.2d at 761.

Where the present case does not deal with the sale of goods within the taxing state, the Commerce Clause cannot be violated. Based on this reasoning, the cases relied

upon in this Court's Opinion that deal with foreign corporations making sales within a taxing state are inapposite with regard to whether or not a nonresident individual has a sufficient nexus with the state he performs labor in.

CONCLUSION

Based on the foregoing, the Idaho State Tax Commission respectfully requests the Court to modify its Opinion and hold that the Idaho Income Tax Act, imposing a tax on the income of train crew members performing labor on through trains while traveling through Idaho, does not violate the Due Process Clause of the Fourteenth Amendment or the Commerce Clause (Art. I, § 8, cl. 3) of the United States Constitution.

Upon doing so, the Court should consider the question of the applicable statute of limitations which has been fully briefed and argued and hold that, as a matter of law, the statutes of limitation for state tax purposes does not begin to run until a taxpayer has properly filed the required return.

In any case, the Tax Commission requests that the Court clarify its original Opinion and articulate the standard to be employed by the Commission in administering the tax law when questions of nexus arise.

DATED this 29th day of June, 1988.

/s/ Larry M. Dunn
LARRY M. DUNN
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I have on this 29th day of June, 1988, served two copies of the within and foregoing RESPONDENT'S BRIEF ON PETITION FOR REHEARING by sending the same by United States mail, postage prepaid, in an envelope addressed to:

WILLIAM E. SIMS
SIMS, LIESCHE & NEWELL, P.S.
1010 Ironwood Drive
Coeur d'Alene, ID 83814

JOHN R. QUINLAN
WM. FREMMING NIELSEN
MILTON G. ROWLAND
PAINE, HAMBLEN, COFFIN
BROOKE & MILLER
1200 Washington Trust
Financial Center
Spokane, WA 99204

/s/ Larry M. Dunn
LARRY M. DUNN
DEPUTY ATTORNEY
GENERAL

APPENDIX B

In the Supreme Court of the State of Idaho

ROBERT F. BLANGERS, et al., Plaintiffs-Appellants-Cross Respondents, v. STATE OF IDAHO, DEPARTMENT OF REVENUE AND TAXATION, et al., Defendants-Respondents-Cross Appellants.	ORDER DENYING PETITION FOR REHEARING AND RELEASING OPINION ON DENIAL NO. 16404 Ref. No. 88RH-15

The Respondents filed a PETITION FOR REHEARING on June 15, 1988, and supporting BRIEF on June 29, 1988, seeking a rehearing of the Court's Opinion released May 25, 1988; the Court having given due consideration to the Petition for Rehearing;

NOW THEREFORE, IT IS HEREBY ORDERED that Respondents' PETITION FOR REHEARING be, and hereby is DENIED and the Opinion on denial of Petition for Rehearing shall be released.

DATED this 28th day of October, 1988.

By Order of the Supreme Court
/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc Counsel of Record
District Court Clerk
District Judge James Judd
Adm. Judge Gary M. Haman
West Publishing
Mead Data Central

APPENDIX C

In the Supreme Court of the State of Idaho

ROBERT F. BLANGERS, PATRICK R. BARTLESON, ROBERT J. TULLY, WALTER T. BARTHOLOMEW, WILLIAM M. RICHTER, RAYMOND H. REEDY, JAMES H. WEAVER and WALTER E. DUNLOP, Plaintiffs-Appellants-Cross Respondents, v. STATE OF IDAHO, DEPARTMENT OF REVENUE AND TAXATION, IDAHO STATE TAX COMMISSION, COMMISSIONER LARRY G. LOONEY, COMMISSIONER CAROL M. DICK, COMMISSIONER MORGAN MUNGER and COMMISSIONER DARWIN L. YOUNG, COMMISSIONERS OF STATE TAX COMMISSION, STATE OF IDAHO AND THE STATE OF IDAHO, Defendants-Respondents-Cross Appellants.	NO. 16404 REMITTITUR

TO: FIRST JUDICIAL DISTRICT COURT, COUNTY OF KOOTENAI.

The Court having announced its Opinions in this cause May 25, 1988 and October 28, 1988, which have now become final; therefore,

IT IS HEREBY ORDERED that the District Court shall forthwith comply with the directive of the Opinions, if any action is required; and

IT IS FURTHER ORDERED that costs in the amount of $892.00 are allowed to Appellants. No attorney fees on appeal.

DATED this 28th day of October, 1988.

Frederick C. Lyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Remittitur entered in the above entitled cause and now on record in my office.
WITNESS my hand and the Seal of this Court 10-28-88

FREDERICK C. LYON
Clerk
By: /s/ Karel A. Lehrman
Deputy

/s/ Lois Dawson
Frederick C. Lyon,
Clerk by Lois Dawson,
Deputy Clerk
Supreme Court
STATE OF IDAHO

APPENDIX D

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ROBERT F. BLANGERS, et al, Plaintiffs, vs. STATE OF IDAHO, DEPARTMENT OF REVENUE AND TAXATION, IDAHO STATE TAX COMMISSION, et al Defendants.	Case No. 56027 MEMORANDUM OPINION

This is a class action brought by the plaintiffs as a declaratory judgment procedure to determine whether or not the defendants can impose Idaho income tax upon the plaintiffs. The plaintiff class is composed of brakemen, firemen, engineers, conductors, and rear brakemen on transcontinental freight trains of the Burlington Northern Railroad Company serving on the route of that company between Spokane, Washington, and points in Montana and thereby travelling through Idaho. Members of the class also include retirees formerly so employed and widows of deceased employees who were similarly employed.

When the matter came on for trial the parties submitted the case upon a stipulation of facts. The stipulated facts are as follows:

1. Plaintiffs are, or were at all times material to this action, train crewman employees of Burlington Northern Railroad Company (hereinafter "BN") or are widows of such deceased BN employees.

2. Plaintiffs are, or were at all times material to this action, residents of the State of Washington, and not residents or domiciliaries of the State of Idaho.

3. In the course of employment with BN, a Federal land-grant railroad, as train crewmen (*i.e.*, engineers, brakemen, firemen and conductors), the train crewmen occupy or occupied non-stop transcontinental freight trains travelling that part of the transcontinental route between Spokane, Washington, and Whitefish or Missoula, Montana, and back to Spokane. The mileage and time spent in Idaho as a percentage of total mileage and time while employed by BN on these trains for each employee constituted less than fifty percent.

4. The trains in crossing the Idaho Panhandle through Kootenai, Bonner and Boundary Counties, are, or were "through" trains which do not perform station or industry switching in Idaho. The trains make no scheduled stops in Idaho. Orders directing the trains come from without the borders of the State of Idaho. There are no crew changes within Idaho. Crews neither report for work nor are they dismissed in Idaho.

5. On or about June 1, 1983, plaintiffs received written notice from the State of Idaho that they were subject to Idaho income tax. The notice indicted (sic) that all taxes due for years prior to 1978 could be waived and no penalties imposed if returns were filed for the years 1978 through 1982 and income taxes paid before a stated deadline of August 1, 1983.

6. Prior to June 1, 1983, payroll information pertaining to amounts paid and mileage spent in the State of Idaho for these BN employees was furnished by Burlington Northern Railroad to the State of Idaho upon

request for the years 1980, 1981 and 1982. Subsequent to the time the June 1, 1983, tax letters from the Idaho Tax Commissioner were received by BN employees, similar Idaho payroll information for the years 1979 and 1980 were furnished by the Montana Department of Revenue to the Idaho State Tax Commission from Idaho payroll information pertaining to these BN employees furnished to the Montana Department of Revenue by the Burlington Northern Railroad.

7. That Exhibit II, a letter dated April 11, 1985, signed by William J. Anderson, Director, United States General Accounting Office, Washington, D.C., is authentic. Defendant, State of Idaho, specifically reserved its right to object to its admissibility into evidence at the time of trial on the basis of relevance. If the letter is admitted into evidence in spite of defendant's objection, it will then be stipulated by counsel that if Mr. Anderson were called as a witness to testify in person, or by deposition, he would testify consistent with the letter itself.

8. That Non-Resident Idaho Income Tax Instructions in their entirety for years 1965 through 1983 be admitted into evidence.

9. That the Court may draw all reasonable inferences from the evidence before it.

10. That the depositions of Darwin Young, Redge Clapp and Phillip M. Aldape, all dated February 15, 1984; and Diane House, Steve Miller and Frank Medlin, all dated October 11, 1984, are to be considered as evidence in this case.

THE IDAHO LAW

For the purpose of our decision herein the Idaho Income Tax Law is found in Title 63, Chapter 30 of the Idaho Code.

I.C. 63-3002 provides in pertinent part as follows:

> It is the intent of the legislature . . . to impose a tax on . . . the income of non-residents which is the result of activity within or derived from sources within this state.

I.C. 63-3003 provides as follows:

> When used in this act, the terms defined in the following sections 63-3004 to 63-3023, inclusive, shall have the meanings respectively ascribed to them.

I.C. 63-3023 provides in pertinent part as follows:

> The term "business situs" shall include . . . working for salary or wages . . . .

I.C. 63-3024 provides in pertinent part as follows:

> A tax is hereby imposed for each taxable year commencing on and after January 1, 1976, . . . upon that part of the taxable income of any non-resident individual . . . derived from sources within the State of Idaho as set forth in § 63-3027A . . . .

I.C. 63-3027A provides in pertinent part as follows:

> In computing the tax of a . . . non-resident individual . . . the tax imposed by § 63-3024, Idaho Code, shall be reduced to the proportion that the adjusted gross income of the taxpayer from Idaho sources bears to the total adjusted gross income from all sources.

I.C. 63-3030 provides in pertinent part as follows:

> (a) Returns with respect to taxes measured by income in this act shall be made by the following: . . . (2) any non-resident . . . having for the current taxable year a gross income . . . from Idaho sources in excess of one thousand dollars.

In *Barraclough v. State Tax Commission*, 75 Idaho 4, 266 P.2d 37 (1954), the Idaho Supreme Court dealt with the meaning of the word "sources," as used in the Idaho Income Tax Law. Therein the Court said:

> The word "sources" when used in statutes dealing with sources of income as compensation for personal services has reference not to the person or entity paying for the service, but to the location where the services are performed. It is generally held that if the income is compensation for labor or services, the place where the labor is performed or services rendered is decisive as being the source of the income.

In *Gee v. West*, 90 Idaho 173, 409 P.2d 116 (1965), the Idaho Supreme Court dealt with a situation similar to the one at hand. In said case Gee and his wife were residents of Clarkston, Washington. Mr. Gee was employed by the Camas Prairie Railroad as a conductor upon a train made up at Lewiston, Idaho. The train's daily run was from Lewiston, Idaho, to Raparia, Washington. Of this daily run, six miles thereof was in Idaho and 141 miles in Washington. Mr. Gee left Lewiston in the morning upon receipt of his orders, and returned there at the end of the run. In dealing with this situation and the statutes hereinabove set forth, the Idaho Supreme Court said:

> Reading I.C. § 63-3002, 63-3023, 63-3024 and 63-3027(a)(3) and (c) and (d), together in the light

> of the Barraclough case, shows that the intent of the legislature was to tax only the amount of income a non-resident received as compensation for labor or personal services performed in Idaho, and derived from Idaho sources . . . We are not confronted with the issue of whether or not a business situs was or was not established in Idaho or Washington, because I.C. § 63-3002, 63-3024 and 63-3027(c) and (d), supra, do not deal with the question of business situs. The criterion as set forth by § 63-3027(c) and (d) (which authorizes the allocation of income derived from sources partly within and partly without this state) is – where the labor was performed or services rendered . . . the issue of business situs is not controlling here . . . .

The Supreme Court approved an allocation by Gee of his income between Idaho and Washington based upon the respective mileage and time spent by Gee in the respective states.

The plaintiffs herein have placed considerable reliance on the concurring opinion of Judge Webb in *Gee*. In that opinion Judge Webb perceived some ambiguity in the income tax statutes as they existed prior to 1965 when considering the question of application to income of non-residents. In Judge Webb's opinion, a 1965 amendment had clarified this ambiguity. It is interesting to note that at the time of the *Gee* decision and the time of Judge Webb's opinion therein I.C. 63-3027 applied to both non-resident individuals and corporations. At that time I.C. 63-3027 read as follows:

> The Idaho taxable income of a non-resident person with business situs in this state or any corporation with a business situs in this state, shall be

> computed and taxed in accordance with the rules set forth in this section . . .

What the majority said in *Gee*, and apparently what escaped Judge Webb's view, was that Gee was not deemed to have a business situs in Idaho nor was it found necessary that his wages earned while working in Idaho be from a business situs in Idaho. The fact that he earned part of his wages in Idaho constituted income from an Idaho source and subjected Gee to taxation without regard to whether or not he had any business situs in Idaho. Thus, *Gee* established two categories for possible payment of Idaho income tax; to-wit, a person earning wages while performing service in Idaho or a non-resident person with a business situs in Idaho.

In any event, any possible confusion upon this matter was eliminated when I.C. 63-3027 was amended in 1975 by Chapter 32, § 1 of the 1975 Session Laws. That amendment struck from I.C. 63-3027 any reference to non-resident individuals and left the section applying only to corporations. Thus it would seem any particular significance attached by Judge Webb to I.C. 63-3027 is now inapposite and that computation of non-resident income from Idaho sources is governed by I.C. 63-3027A. This latter section this Court finds to be in full accord with views expressed by the majority in *Gee*.

Relying upon what was then I.C. 63-3027(n)(3), Judge Webb concluded that wages or salaries earned while working in Idaho would not be taxable unless service was performed within Idaho and there was a base of operations in Idaho. This Court believes the Webb opinion to have been in error. First, I.C. 63-3027 as it existed

from 1965 to 1975 applied only to non-resident individuals or corporations with a business situs in the State of Idaho. The *Gee* majority concluded that working for wages within Idaho constituted an Idaho source of income and the question of any business situs or base of operations was immaterial. *Gee* thus recognized two categories of non-resident individuals for tax purposes. These were non-residents working within Idaho for salaries or wages and non-residents having a business situs in Idaho. These are clearly two different situations. Second, I.C. 63-3027 was intended to define the method of computing income for non-resident individuals or corporations with a business situs in Idaho. Subparagraph (n) of said section was merely a section defining the meaning of "terms." Subsection (a)(3) defined "compensation" as meaning wages, salaries, commissions and any other form of remuneration paid to employees for personal services. Subparagraph (n) simply defined when the compensation would be deemed to have been paid within the State of Idaho. These sections were designed to define the means of fixing allowable deductions from gross income for the purpose of determining what would be the income allocable to Idaho sources for tax purposes. These subsections were not intended to deal with the individual non-residents whose status was that such as Gee or the plaintiffs herein of simply an employee whose employer required his services to be performed partly within the State of Idaho and partly without.

In their brief plaintiffs contend that the 1965 law as interpreted by the Webb opinion in the *Gee* case was carried forward in 1975 into I.C.63-3027A. The basis of this argument appears to have been sub-paragraph (a) of

section 63-3027A which required that any taxpayer having income taxable both within and without Idaho to allocate and apportion such income in accordance with the rules set forth in § 63-3027. However, in 1976 in Chapter 89 of the Session Laws of that year the legislature repealed said sub-section (a). Thus it appears to this Court that finally in 1976 the legislature had brought the statutory provisions very clearly into accord with the *Gee* decision. Thus, assuming for the purposes of argument, that the Webb opinion correctly interpreted the law from 1965 until 1976, it is clear that it would have no further application and not be correct after the action of the 1976 legislature.

The briefs of the parties contain lengthy discussions regarding various regulations adopted by the State Tax Commission pursuant to its authority to do so. In considering these regulations it must be kept in mind: regulations cannot make taxable that which the statutes do not; nor can the regulations exempt from taxation that which the statutes require to be taxed.

Regulation 27A from 1966 until its amendment in November of 1981 contained pertinent language as follows:

> 27A(c). Non-Resident Individuals. Income from Idaho sources includes but is not limited to: . . . (2) Compensation paid in Idaho if . . . (c) some of the service is performed in Idaho and (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in Idaho . . .
>
> ***

> (8) Any other income which is not specifically exempt under the provisions of the Internal Revenue Code in § 63-3022, Idaho Code.

It does not appear to this Court that this regulation was intended to be the total and complete definition of Idaho taxable income. Specifically, it is noted that it starts out by saying that income from Idaho sources "includes but is not limited to," and then goes on with various definitions. Subparagraph (8) specifically includes other income which is not specifically exempt. So construed the regulation would not be contrary to the statutes as hereinabove set forth. Construed as plaintiffs contend it would be contrary to such statutes and therefore void. Nevertheless, the Court finds that the regulation as written was confusing and misleading.

The Idaho Tax Instructions issued annually from 1966 through 1982 contained the following language:

> WHAT TO REPORT AS INCOME:
>
> Non-Residents.
>
> If a non-resident individual has an Idaho business situs, his income therefrom as well as all other income from Idaho sources must be included in Idaho taxable income. Income from other Idaho sources includes the following:
>
> (1) Compensation paid in Idaho if . . . (c) some of the service is performed in Idaho and (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in Idaho . . . .

It is noted that this instruction form does not contain the non-limiting and cautionary language that the definitions do nor does it limit or totally define income from all Idaho sources. These instructions are not in accordance

with the Idaho statutes hereinabove set forth concerning the tax status of individuals who work for salary and wages and who perform that service both within and without the State of Idaho. Again, the Court would observe that the tax instructions would be very confusing and misleading to a non-resident in the status of the plaintiffs herein who might read the same.

It is the conclusion of this Court that the Idaho statutes have since at least 1965 required persons working for salary or wages within the State of Idaho to pay income tax thereon and if that service is performed both within and without the State of Idaho the amount allocable as Idaho income would be apportioned according to the amount of service performed in Idaho as compared to the total service. In the case of trainmen, the *Gee* case is controlling and the plaintiff trainmen's income would be allocated to Idaho upon the basis of mileage and time spent in Idaho while performing their services for their employer.

The parties in their briefs have devoted lengthy discussions as to whether presently existing regulations 27A and 14 were validly adopted in November of 1981. The Court concludes it is unnecessary to decide that issue. As before said herein, if the regulations are construed as plaintiffs contend, they would be in conflict with the statutory provisions and void. If they are construed, which the Court concludes they can and should be, as consistent with the prior statutes then the amendments in 1981 did not bring about any substantive change in the law. Indeed, enactment of the regulations cannot change the substantive law. The 1981 amendments merely clarified and brought into clear conformance with statutory

provisions what were previously confusing and misleading regulations. Therefore, the notice published by the defendants pursuant to I.C. 67-5203 was sufficient. As the notice stated, deletions were made to remove unnecessary language and additions were made to clarify language. But no substantive change as to who was taxable or what income was taxable was made, nor could it have been.

The class of persons whom plaintiffs represent herein has been defined to include retired train crewmen and widows of train crewmen. The parties have not discussed the status of these persons separately in their brief; but it does appear to the court that their status would be different. The widow's benefit is not compensation paid to her for any services performed by her in the State of Idaho. Thus, there would be no Idaho source to that income the widow receives. It might arguably be said that retired employee's benefits represent deferred compensation for services that may have been performed at least in part in Idaho. Nothing in the stipulated facts herein so indicates, nor do the stipulated facts negate, the possibility that the retired employee's benefits would be based upon his entire years of service to the employer. When so considered, it is possible that the period of time services were performed in Idaho when compared to the total number of hours of service performed by the employee for the employer before becoming eligible for retirement would be very negligible. The burden is on the state to show that such retirement benefits are taxable as income in Idaho and it has not done so. Both parties have conceded in their briefing herein that in construing the taxation statutes any doubt or ambiguity is to be resolved in favor

of the taxpayer. It is therefore the conclusion of this Court that the widows' benefits and the retirement benefits received by widows and retired employees are not subject to the Idaho income tax because they do not constitute compensation for labor or services performed within the State of Idaho. This ruling does not limit or prevent taxation for any Idaho income earned by an employee prior to retirement; nor does it limit the liability of the estate of a deceased employee for any taxes due prior to the date of death.

Plaintiffs have also attacked regulation 14 on the basis that it singles out transportation employees and treats them differently from other non-residents generally. Plaintiffs appear to base this contention on their construction of the statute and regulation 27A that non-residents working partly within and partly without Idaho are only taxable in Idaho where a base of operations exists within Idaho. As already demonstrated above, the Court does not agree with that conclusion. As the Court perceives the statutes and regulations, all non-residents are required to pay Idaho income tax upon their income from sources within Idaho. If they are performing labor and service within Idaho that is a source from within Idaho. As far as being subject to the basic Idaho income tax, transportation employees are not treated any differently than all other non-residents. Regulation 14, consistent with the statutes and the decision in the Gee case, simply state that transportation employees shall apportion their income according to the miles and time spent in Idaho. This does not constitute any lack of uniformity in determing (sic) who is taxed and who is not. It simply sets forth a practical, common sense, and legally

approved method of determining how much of such employee's income is apportioned to Idaho and how much is excluded. In this sense the regulation is clearly within the authority of the defendants to make as one necessary to implement the enabling statute. Regulation 14 was a needful rule for the enforcement of the income tax statutes and is constitutionally permitted by Idaho Constitution, Article 7, § 12, and I.C. 63-3039.

The remaining question of Idaho law concerns the statute of limitations. The statute is found in § 63-3070 which provides as follows:

> In the case of a false or fraudulent return with intent to evade tax, or of a failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within three years after the date of the discovery of the facts constituting the fraud.

It does not appear that this section has ever been judicially interpreted in Idaho.

The intent and meaning of the section is ambiguous. The statute does not clearly state that the limitation period is three years from discovery of a failure to file a return. It does not clearly equate a failure to file as being fraudulent. It cannot be clearly ascertained if the legislature intended to declare as a matter of law that a failure to file a return constituted fraud. In this case, the Court finds that there is absolutely no evidence of record to indicate any fraudulent intent on the part of the plaintiffs. They have at all times contended, and now contend, that they simply are not subject to the Idaho Income Tax Act. There is absolutely nothing to indicate they are not

acting honestly and in good faith in asserting this contention.

Reference is again made to the fact that both sides herein have agreed that where ambiguity exists in a tax statute all doubt is to be resolved in favor of the taxpayer and against the taxing authority. This Court therefore concludes that I.C. 63-3070 when applied to cases where there has been no fraudulent failure to file a tax return limits the state to a three year period of limitations from the date the return should have been filed. Thus, in cases where there has been a non-fraudulent failure to file a tax return the taxing authority is presumptively limited to a three year period unless it establishes the existence of fraudulent intent to evade tax. The burden is upon the taxing authority, in this case the defendants, to allege and establish that fraud. Defendants in this case have done neither.

Further, additional grounds exist for limiting the defendants herein as to the period of time that they may demand back taxes from the plaintiffs. As already mentioned herein, the defendants' regulations and instruction booklets to taxpayers are, to say the least, confusing and misleading to any non-resident who might examine the same to determine if he owed Idaho any income tax. To say the worst, they may have even been absolutely contrary to the Idaho statutes. It may be considered appropriate to hold that the resident of a state is presumed to know the statutory laws of his state of residence but it is certainly something else to hold that the resident of a foreign state is presumed to know the statutory law of the State of Idaho. In the opinion of this Court, in view of

the confusing and misleading regulations and instructions to taxpayers, it would be unfair, unjust and inequitable to allow the defendants to go back an unlimited period of time for the purpose of collecting tax. Because of the nature of the regulations and tax instructions as pointed out herein, this Court holds the defendant estopped to collect taxes for any greater period of time than limited by the statute of limitations as interpreted hereinabove. The Court further points out that to interpret I.C. 63-3070 as equating a failure to file as constituting a fraudulent intent to evade tax would bring the plaintiffs dangerously close to being in violation of I.C. 63-3075 – the criminal statute. It is hard to imagine a fraudulent intent to evade tax that does not amount to a willful failure to pay the tax. It is such willful failure that triggers the criminal penalties of I.C. 63-3075. For the reasons already reviewed herein concerning the good faith of the plaintiffs and their reasons for nonfiling of returns, it would be a travesty upon the name of justice to suggest that these plaintiffs might be guilty of criminal conduct.

The Court finds that the first act to assess taxes upon the plaintiffs of which the plaintiffs had any notice was the June 1, 1983, letter referring to Idaho non-resident income tax returns for 1978 – 1982. This is the so-called "amnesty letter." The tax return for tax year 1979 should have been filed in April of 1980. The State would therefore, in this case, have until April of 1983 to take action to assess any non-paid taxes for that year. Having not taken any such action until June of 1983, the State is barred by the statute of limitations from taking any proceedings to collect taxes for the taxable year 1979 or any year prior

thereto. The defendants have timely commenced proceedings to assess taxes for the tax years 1980 and all subsequent years.

INTERSTATE COMMERCE CLAUSE

The plaintiffs contend that imposition of Idaho's income tax upon them would violate Article 1, § 8, Clause 3 of the United States Constitution – commonly known at (sic) the Interstate Commerce Clause.

An income tax is generally regarded as in the nature of an excise tax. See *State and Local Taxation*, 443, 71 AmJur.2d. It has been so held in Idaho. *Diefendorf v. Gallet*, 51 Idaho 619, 10 P.2d 307 (1932).

The commerce clause operates to limit and restrict, in certain respects, the taxing power of the states insofar as such commerce is involved or affected; the states are prohibited from imposing, by any form of taxation, without the assent of congress, any direct and immediate burden on such commerce, but state taxation is not invalid merely because such commerce is incidentally, remotely, or indirectly affected thereby. In addition, the commerce clause does not preclude a state from imposing taxes upon those activities or aspects of an interstate business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the state.

A tax which so seriously affects the interchange of commodities between the states as to essentially impede or seriously interfere with it is an unconstitutional regulation of commerce. State taxes whose tendency is to prohibit interstate commerce or place it at a disadvantage

as compared, or in competition, with intrastate commerce, or which discriminate against interstate commerce, are unconstitutional. On the other hand, the exemption of those engaged in interstate commerce from non-discriminatory taxes should not be extended beyond the necessity of keeping that commerce free from interference; it was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burdens. To render a state tax violative of the commerce clause it must be shown to fall upon interstate commerce with an economic weight disproportionate to the burden of taxation imposed upon intrastate commerce. The fact that the imposition of a state tax adds to the cost of interstate commerce is not alone sufficient to invalidate the tax as an interference with that commerce.

State statutes imposing a tax upon the income of nonresident individuals earned or accruing within the taxing state have been upheld as against constitutional challenges based on the due process clause; the privileges and immunities clause; the equal protection of the law clause; and the commerce clause. Only such part of the income of a nonresident as is fairly attributable either to property located in the state or to events or transactions which occur there is subject to taxation by the state. *See* 71 AmJur.2d, *State and Local Taxation*, § 472.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d (1977), the United States Supreme Court set forth four factors to be analyzed in determining the validity of a state tax under the commerce clause. These factors were: (1) whether the activity taxed had a sufficient nexus with the taxing state; (2) whether the tax

is fairly related to the benefits provided by the state to the taxpayer; (3) whether the tax was fairly apportioned to local activity; and (4) whether it discriminated against interstate commerce.

Herein the plaintiffs as train crewmen are performing their labor and service for their employer within the boundaries of the State of Idaho. Plaintiffs seem to concede that a station master working for Burlington Northern at a station in Idaho but who might happen to reside in Washington would be subject to the Idaho income tax. This Court can perceive no reason in logic or common sense why the fact that plaintiffs' work station is moving rather than stationary should make any diference (sic). The Court concludes that plaintiffs' work and service has sufficient nexus with the State of Idaho to subject the income therefrom to the Idaho income tax. *See, Jackling v. State Tax Commission,* 58 P.2d 1167, 40 N.M. 241 (1936).

Herein the State of Idaho, either directly or through its local government structures, provides fire protection to preserve and protect the physical structures upon which the trains whereon plaintiffs are working pass. Likewise police protection is provided which assures the plaintiffs' personal safety from criminal attack or sabotage of the work place while plaintiffs are in Idaho. Likewise, in the event of accidental injury while in Idaho, the state provides emergency medical services. These state services provide the opportunity for plaintiffs to exercise their intelligence, skill and labor while performing their work and service for their employer while within the State of Idaho. Thus, the tax upon plaintiffs' income apportioned to the time that they are in Idaho is fairly related to the benefits the plaintiffs receive. *See,*

Wsiconsin (sic) v. J. C. Penney, 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. ___ (1941); *Lung v. O'Chesky*, 617 P.2d 1317, 94 N.M. 802 (1980); *State of Alaska v. Petronia*, 418 P.2d 755, 69 Wa.2d 460 (1966); *Jackling v. State Tax Commission, supra.* The language of the Supreme Court of Washington, the state of plaintiffs' residence, speaking in the *Petronia* case is particularly applicable. In *Petronia* the State of Alaska was attempting to collect an income tax on the earnings of Washington residents who were seamen on fishing vessels operating within Alaska's waters. The Washington court said:

> We are satisfied that the benefits of employment afforded by this economic activity of the State of Alaska constituted minimum connections within the rule to avoid a denial of due process under the Fourteenth Amendment to the United States Constitution.
>
> . . . The rule requiring a uniform system regulated solely by the federal government in maritime commerce has not been violated by the imposition of taxes on earnings of seamen within the waters of the State of Alaska by the Alaska Net Income Tax Act; that congress has not disturbed the right of a state to impose income taxes on the wages of seamen earned within its boundaries . . . .
>
> . . . The Alaska Income Tax Act as it applies to these seamen, makes no attempt to interfere with or control the conduct of any business. It is not a privilege tax . . . .
>
> . . . The instant tax is not a direct tax upon the interstate commerce or the vessel engaged therein. It is rather a tax upon the income derived therefrom, property [sic] apportioned so as to tax only that net income of seamen which is earned within the jurisdiction of Alaska.

State of Alaska v. Petronia, 418 P.2d, at 761. *See* also, *Alaska Steam Ship Company v. Mullaney*, 180 F.2d 805 (9th Cir. 1950); *Sjong v. State of Alaska*, 622 P.2d 967 (1981). In the *Sjong* case the Alaska Supreme Court stated that the simple but controlling question is whether the state has given anything for which it can ask return.

Upon the question as posed by the Alaska Supreme Court, the case of *Lung v. O'Chesky, supra*, is instructive. Therein the Court said:

> The power to tax does not rest on a measurable economic duty of the state towards it citizens, but on less tangible benefits, on the "fruits of civilization." (citations omitted.) The opportunity to exercise intelligence, skill, and labor while employed in the State of New Mexico has been held to be sufficient benefit to support an income tax.

It is the conclusion of this Court that the tax imposed herein is fairly related to the benefits provided by the state to the taxpayer.

As non-residents, the plaintiffs are entitled to have their income fairly apportioned to that earned within Idaho and to exclude from taxation that earned without the boundaries of Idaho. An apportionment formula is valid if it assigns as state income that which can reasonably be said to result from activities within its borders. *See, Northwestern States Portland Cement Company v. Minnesota*, 358 U.S. 450, 79 S.Ct. 357 (1959). Exact apportionment is not required. If the apportionment plan adopted by the state is reasonable and does not result in a palpably disproportionate result, rough approximation rather than precision is sufficient. *International Harvester Company v.*

Evatt, 329 U.S. 416, 67 S.Ct. 444, 91 L.Ed. 390 (1947); 71 Am.Jur.2d, *State and Local Taxation*, § 456; Annotation 67 A.L.R.2d 1322. Herein the defendants propose to apportion the plaintiffs' earnings on the ratio of the track miles of their working trip in Idaho divided by the total track miles between Spokane, Washington, and either Whitefish or Missoula, Montana. The plaintiffs have not demonstrated in any way that such apportionment would be arbitrary or unfair. It is therefore the Court's conclusion that the Idaho income tax has been fairly apportioned to local activity within the State of Idaho.

The final inquiry is whether the tax discriminates against interstate commerce. It is noted that the tax in question does not place any tax upon goods in transit. It in no way directly affects the interstate movement of commerce. It does not impose a tax upon plaintiffs for the mere privilege of passing through the state as a traveller or tourist. Rather, it taxes the income earned by performance of work and service for an employer while within the State of Idaho. Employees, such as plaintiffs, are not treated any differently than are Idaho residents engaged in interstate commerce nor are plaintiffs treated any differently than are non-residents or residents engaged in intrastate commerce. Plaintiffs have argued that imposition of the income tax upon them will result in the costs thereof being passed on to their employer by demands for increased wages and, thus, eventually will result in increased cost to the transportation of goods in interstate commerce. In the Court's opinion this potential result is too indirect, remote and uncertain to come within the prohibition of the commerce clause.

It is the Court's conclusion that the tax here in question does not discriminate against interstate commerce.

Plaintiffs argue that 49 U.S.C. 11504 is a bar to their being taxed. Said section provides that plaintiffs' employer is not required to withhold tax or provide other wage information because plaintiffs are neither residents of the State of Idaho and that the mileage travelled by them in Idaho upon their work station is less than fifty percent of the total mileage they travel. This same argument was advanced in *State of Alaska v. Petronia, supra,* and was there rejected. Said section does not disturb the right of the state to enact or impose an income tax. It may hamper collection, and it may cause plaintiffs to face a substantial tax burden at the end of the year when no part of their tax liability has been prepaid by withholding, but the federal law in question does not attack the state's authority or power to levy and impose the tax. This Court would note that income taxes were enacted at both federal and state levels and were collected for many years before the withholding feature was enacted. In any event, concerning 49 U.S.C. 11504 this Court finds the reasoning of the *Petronia* case to be persuasive.

Plaintiffs seek to analogize themselves as equivalent to an airline crew in an airline which overflies Idaho but does not start its flight or land in Idaho. But in the view of this Court there are distinctions. It is probable that in the case of airplane overflights the State of Idaho cannot be said to provide police and fire protection to the same extent as it does for the ground facilities upon which plaintiffs work. Whether or not the provision of services for airline carriers in the event of a plane crash would provide sufficient connection and basis with the State of

Idaho for imposition of taxes is a question that need not be resolved in this case.

Plaintiffs argue that the method of apportioning their income that defendant has adopted ignores the relationship of values to time and suggests that while operating the train through Idaho the plaintiffs are on "slack" time and that their services performed in Washington and Montana are more valuable than that performed in Idaho. This Court would presume, however, that while operating the train in Idaho the plaintiffs are performing their duties carefully and diligently to preserve and protect their own safety and preserve and protect the safety and security of persons on or near the railroad track and to preserve and protect the extremely valuable equipment and cargo entrusted to their care. This Court can perceive no difference in the value of the time performed by plaintiffs in operating a moving train in either Washington, Idaho or Montana. Thus, it would leave only the "in station" time at either Spokane or destinations in Montana as constituting the more valuable time. This Court cannot conceive that a train at rest in the station requires more valuable time and attention than one hurtling down the track at sixty miles per hour.

EQUAL PROTECTION CLAUSE

Plaintiffs contend that their rights under the equal protection provisions of the Idaho and United States Constitutions have been violated. First, plaintiffs contend that they have been denied equal protection because they are taxed as non-resident transportation employees regardless of their post of duty or base of operations. However,

as demonstrated hereinabove, plaintiffs misperceive the Idaho law. An employee who resides outside of the State of Idaho and works within the State of Idaho for wages and salaries is subject to income taxation in Idaho for a properly apportioned part of the salaries and wages earned within Idaho regardless of whether he is or is not a transportation employee. Idaho residents who work for salaries and wages are subject to Idaho income tax and likewise non-residents working for salaries and wages within Idaho are liable for the Idaho income tax properly apportioned. They are all treated alike. The formulas for apportioning Idaho income to non-residents need not be exactly the same for all situations. A base of operations or business situs is not a necessary predicate to the taxation of a non-resident working for salaries or wages within Idaho territory. If such be considered necessary then both I.C. 63-3023 and *Gee, supra,* establish that the act of being physically present within Idaho and therein working for salaries or wages constitutes having a base of operations or business situs in Idaho for such persons.

Plaintiffs contend that the tax in question impacts on their constitutional right to travel. As pointed out hereinabove, plaintiffs are not simply tourists travelling through the state. They are performing work and labor in return for wages and salaries while within the State of Idaho. The plaintiffs' constitutional right to travel where they wish is not being denied them. Simply their wages and salaries while working in Idaho are being subjected to the Idaho tax. As before mentioned herein, this Court can see no logical reason that it makes any difference that plaintiffs' work station is moving rather than stationary.

In this regard, at page 59 of their brief, plaintiffs recognize that the defendants' regulations as amended in 1981 brought said regulations into constitutional conformance by treating all non-residents alike. Thus it would appear that even plaintiffs have no challenge to the tax act under the equal protection clauses since 1981. In this Court's view, as set forth hereinabove, the pre-1981 regulations and tax form instructions simply did not comply with the statutory and case law of the state. As such they were void. Thus we need not be concerned with the constitutionality of said regulations and tax forms.

Plaintiffs further contend they have been denied equal protection by being selected for discriminatory enforcement. There are three elements to examine in a case of alleged denial of equal protection based on discriminatory enforcement. These are: (1) that discrimination by selective enforcement has occurred; (2) that such discrimination was intentional and deliberate; and (3) the discrimination was based upon an unjustifiable standard or arbitrary classification. *See Henson v. Department of Law Enforcement*, 107 Idaho 19, 684 P.2d 966 (1984); *State v. Bowman*, 104 Idaho 39, 655 P.2d 933 (1982); *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct 501 (1962).

Addressing first the fact of discrimination, plaintiffs again point to Idaho Income Tax Regulation 14(c) which speaks to non-resident transportation employees. It appears from the record herein that plaintiffs may indeed be the first of such groups of non-resident wage earners upon which the defendant has moved to impose the Idaho tax. The Court also notes, however, that Idaho has only recently provided and funded specific facilities for the defendant tax commission to undertake programs of

enforcing and collecting under the Idaho Income Tax Act from such persons. The fact that such non-residents have for many years gone untaxed and that plaintiffs happen to be the first moved upon by the taxing authorities does not establish a specific intent to single out and discriminate against plaintiffs. Further, in oral arguments before the Court all parties have conceded that this is a test case and that defendant is awaiting the result of this case in determining whether it should spend time and money upon attempting to collect income taxes from other non-residents who are not paying Idaho income tax. If it be assumed that there are significant groups of non-residents who are not paying Idaho income tax as required by Idaho law, then certainly the defendants should undertake a program of enforcing collection against them. It must be remembered that every journey starts with the first step. Realizing the limited resources of the State of Idaho and the virtual impossibility of moving against all such non-resident groups simultaneously, this Court will not interpret a failure to move against all simultaneously as an indication of discrimination. If defendants prevail in this litigation and do not thereafter diligently pursue collection of income taxes from other non-residents similarly situated then, indeed, the plaintiffs might have cause to complain about discrimination. But, in the opinion of this Court, at this point in time they do not.

The first prong of the three-pronged *Henson* case test being absent, the plaintiffs have failed to establish a denial of equal protection because of discriminatory enforcement. It then becomes unnecessary to consider prongs two and three.

Plaintiffs further contend that they have been denied equal protection because they have been subjected to taxes not imposed on others of the same class. With this contention the Court does not agree. First, as has already been demonstrated herein, the taxing law of Idaho does not treat plaintiffs any differently than other non-residents similarly situated. Second, as already stated, the fact that plaintiffs have been moved against first as part of any overall effort by the defendants to collect taxes due from non-residents of Idaho will not be interpreted by this Court as singling out plaintiffs for imposition of tax and excusing or ignoring others from whom such tax might be due. The fact that plaintiffs are the first against whom collection action has been instituted does not, *ipso facto*, mean that they have been discriminated against.

CONCLUSION

It is the conclusion of this Court that the laws of Idaho require plaintiffs herein, with the exception of certain widows and retirees as hereinabove set forth, to pay Idaho income tax and that defendants may require them to file a return for the purposes of determining their tax liability and assessing the same. The tax years for which such returns may be required have been hereinabove set forth. The Court further concludes that the injunction heretofore issued should be dissolved.

This memorandum opinion shall constitute the Court's findings of facts and conclusions of law. Counsel for the defendants shall prepare a judgment consistent herewith.

The Court finds that this action has not been brought, maintained or defended frivolously or without just reason or cause. Therefore, each party shall pay their own attorney's fees. Defendants will be awarded their costs of Court.

DATED this 9th day of January, 1986.

/s/ Watt E. Prather
Watt E. Prather, District Judge

I hereby certify that copies of the foregoing opinion were mailed, postage prepaid, this 13 day of January, 1986, to:

William Sims
Attorney at Law
1010 Ironwood Drive
Coeur d'Alene, Idaho 83814

Wm. Fremming Nielsen
Attorney at Law
1200 Washington Trust Financial Center
Spokane, Washington 99204

William Von Tagen
Deputy Attorney General
State Tax Commission
Box 36
Boise, Idaho 83722

LEAH PHELPS, CLERK OF COURT
BY: Laura Degenhardt
Deputy

APPENDIX E

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ROBERT F. BLANGERS, et al., Plaintiffs, -vs- STATE OF IDAHO, DEPARTMENT OF REVENUE AND TAXATION, IDAHO STATE TAX COMMISSION, et al., Defendants.	Case No. 56027 DECLARATORY JUDGMENT (Filed February 18, 1986)

THE ABOVE-ENTITLED MATTER came before the Court on the 11th day of September 1985, for hearing as a class action brought by Plaintiffs for a Declaratory Judgment to determine whether or not the Defendants could require Plaintiffs to pay Idaho income taxes. The Plaintiffs appeared, by and through counsel, William Fremming Nielsen, and William von Tagen appeared on behalf of Defendants.

The parties submitted this case based upon a Stipulation of Facts, and the Court heard oral arguments by respective counsel. After consideration of the oral arguments and the Briefs which have been submitted by the parties, the Court prepared a Memorandum Opinion constituting the Court's Finding of Facts and Conclusions of Law.

IT IS HEREBY ORDERED AND DECLARED THAT:

1. Plaintiffs are subject to Idaho state income tax for the tax year 1980 and all subsequent years for income earned by Plaintiffs while employed on trains traveling through the state of Idaho;

2. Plaintiffs are not subject to Idaho income tax on widows' benefits or retirement benefits;

3. Defendants may require that Plaintiffs, except for those Plaintiffs whose income consists of widows' benefits or retirement benefits, file Idaho income tax returns for tax year 1980 and all subsequent years for the purpose of assessing the amount of tax owing;

4. For purposes of determining income earned by Plaintiffs which is attributable to the state of Idaho, Defendants may require that Plaintiffs apportion their income based upon the number of track miles traveled by Plaintiffs in the state of Idaho in proportion to the total track miles traveled;

5. Plaintiffs are required to pay costs, other than attorneys fees, incurred by Defendants in defending this action in the amount of _____.

IT IS SO ORDERED.

DATED this 13th day of February, 1986.

/s/ Watt E. Prather
WATT E. PRATHER
DISTRICT JUDGE

(2)

Supreme Court, U.S.
FILED
FEB. 23
1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1266

In The

Supreme Court of the United States

October Term, 1988

IDAHO STATE TAX COMMISSION, et al.,

Petitioners,

v.

ROBERT F. BLANGERS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Idaho

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM F. SIMS
SIMS, LIESCHE & NEWELL, P.S.
1010 Ironwood Drive
Coeur d'Alene, Idaho 83814

* JOHN R. QUINLAN
WILLIAM FREMMING NIELSEN
MILTON G. ROWLAND
Of –
PAINE, HAMBLEN, COFFIN, BROOKE & MILLER
1200 Washington Trust Financial Center
Spokane, Washington 99204
(509) 455-6000

Attorneys for Respondents

* Counsel of Record for Respondents

February 21, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. May a non-resident individual who earns compensation while travelling through a state on a nonstop transcontinental train be subjected to that state's income tax under the due process (U.S. Const., amend. XIV, § 1) and commerce (U.S. Const., art. 1, § 8, cl. 3) clauses?

2. Does physical presence alone, that is, without economic presence, within a state, under the conditions stated in the question presented above, constitute sufficient nexus under the due process and commerce clauses to subject non-resident individuals to state income taxes?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents oppose the Petition for Writ of Certiorari. Certiorari should be denied because (a) the decision of the Supreme Court of the State of Idaho is not in conflict with any other reported appellate decision and (b) the Supreme Court of Idaho's decision is entirely consistent with this Court's prior decisions.

OPINIONS

The opinions below are found in the Appendix to the Petition for Writ of Certiorari. The opinions consist of:

1. Kootenai County, Idaho District Court Memorandum Opinion dated January 9, 1986. Petitioners' App. at 79.

2. Supreme Court of Idaho Opinion dated May 25, 1988. Petitioners' App. at 1.[1]

3. Supreme Court of Idaho Denial of Petition for Rehearing dated October 28, 1988. Petitioners' App. at 41. (The Idaho State Tax Commission Petition for Rehearing

[1] Attached to the dissents to that opinion are docket entries in a Montana tax case. Petitioners' App. at 32-36. The Montana case was not a part of the record in the case below, is based on significantly different facts, and is therefore of no significance. If such docket entries are intended to suggest a factual relationship between the Montana case and the instant, Idaho litigation, Respondents object on the ground that they were not given an opportunity to be heard with respect to such suggestion, which they deny, and move to strike that portion of Petitioners' Appendix. The Montana case is, Respondents submit, not at issue herein.

dated June 29, 1988 is attached thereto. Petitioners' App. at 59 *et seq.*)

STATEMENT OF FACTS

The facts of the case were stipulated by the parties. (Petitioners' App. at 79-81.) As noted below, the Petition contains factual assertions not found in the record herein.

Respondents are, or were at all times material to this action, train crewmen employed by Burlington Northern Railroad Company (hereinafter "BN") or the widows of such deceased BN employees. Respondents are residents of the State of Washington.

In the course of their employment with BN, a federal land-grant railroad, as train crewmen (i.e., engineers, brakemen, firemen and conductors), Respondents occupy or occupied non-stop transcontinental freight trains travelling that part of the transcontinental route between Spokane, Washington and Whitefish or Missoula, Montana, and back to Spokane. The mileage and time spent in Idaho as a percentage of total mileage and time while employed by BN on these trains for each employee constituted less than fifty percent.

The trains on which Respondents work on the Idaho routes traverse the Idaho panhandle, through Kootenai, Bonner and Boundary counties;[2] they are "through" trains which did or do not perform station or industry switching in Idaho. The trains make no scheduled stops

[2] The Idaho panhandle is approximately 100 miles across.

in Idaho. Orders directing the trains come from without the borders of the State of Idaho. There are no crew changes within Idaho. Crews neither report for work nor are they dismissed in Idaho.

On or about June 1, 1983, Respondents received written notice from the State of Idaho that they were subject to Idaho income tax. The notice indicated that all taxes due for years prior to 1978 could be waived and no penalties imposed if returns were filed for the years 1978 through 1982 and income tax paid before a stated deadline of August 1, 1983.

Some 309 of the BN employees as a class filed a declaratory judgment action in the Kootenai County Idaho District Court. The employees sought a declaration that the Idaho State Tax Commission was prohibited by Idaho law and the federal constitution from imposing Idaho income tax on them. Judgment declaring the BN employees subject to Idaho income tax was entered by the Kootenai County District Court on February 18, 1986, and the employees appealed to the Idaho Supreme Court.

The Idaho Supreme Court reversed the trial court by Order dated October 28, 1988. Petitioners' App. at 76. The Petitioners, Idaho State Tax Commission et al., seek a Writ of Certiorari from that decision.

The "Statement of the Case" (Petition at pp. 4-6) contains statements not found in the stipulated facts of this case. On page 4, it is stated that the Respondents work in Idaho on a "regular and systematic" basis. It might be inferred, though it was not stipulated by the parties, that the transcontinental trains cross Idaho on a "regular and systematic" basis. But this inference does

not justify the additional conclusion that the BN employees involved work on those trains on a "regular and systematic" basis. In any given period, some employees may have been in substantial part employed on different rail routes, not entering or crossing Idaho.

The Petition also states (p. 6) that between 25% and 40% of the wages earned by the employees are earned while they are in Idaho. The stipulated facts do not include such a statement; such stipulated facts only say that less than 50% of the mileage and time of each employee was spent in Idaho.[3]

Petitioners also incorrectly assert that the Idaho workmens compensations laws would apply to employee injuries in Idaho. Petitioners' App., at p. 10. Respondents object to this unfounded assertion, which is not based upon the record herein, was not argued below, is not clear

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[3] The "less than 50%" criteria is that used by the Idaho Legislature in enacting § 63-3023B of the Idaho Code, effective January 1, 1988. Section 3023B was enacted by the Idaho legislature after the Washington and Utah legislatures enacted retaliatory tax legislation against Idaho residents in Washington and Utah. Effective January 1, 1988, Idaho Code § 63-3023B (*see* Idaho Supreme Court opinion upon rehearing, Petitioners' App. at p. 51) exempts rail and motor carrier employees from the Idaho state income tax if less than half of their activities are in Idaho. This statute was enacted prior to the decision of the Idaho Supreme Court in this case. Under § 3023B of the Idaho Code, the BN employees, effective January 1, 1988 are not subject to Idaho income tax under the facts of this case. As the Idaho Supreme Court correctly noted, such minimums are constitutionally irrelevant, as they are subject to change at the whim of the legislature. Petitioners' App. at 50-52.

as a matter of substantive law, and is factually incorrect. In fact, BN is self-insured for industrial insurance purposes with its employees being covered by the Federal Employers Liability Act, 45 USC 51 *et seq*. Therefore the Respondents are *not* subject to Idaho workmens compensation laws, but rather are specifically excluded therefrom. Further, Idaho Code § 72-707 is not clear with respect to its operative effect upon non-residents merely travelling across the state.

REASONS FOR DENYING THE PETITION

I. PETITIONERS' STATEMENT OF "QUESTIONS PRESENTED" DOES NOT ADDRESS TWO CRITICAL ASPECTS OF THIS CASE

The Petitioners' statement of the "Questions Presented" (Petition at p. iii) does not include two critical aspects of the case. The first is that the Respondents are in constant *travel* through Idaho while they work (i.e., they are not commuters[4]). Second, the individual employees thus as such have no contact or interaction with the economy of Idaho. The employees cannot and do not stop to load or unload freight or passengers in Idaho.

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[4] Respondents are not commuters. Commuters are persons who travel from a place of residence outside the taxing state to duty stations within such state. *See American Commuters Association, Inc. v. Levitt*, 279 F. Supp. 40, *affirmed*, 405 F.2d 1148 (2d Cir. 1969). Commuters are taxable in the state in which they work because such state provides benefits for which the state may ask return. These "benefits" include "a place to work, the commercial activity in the State[,] and general services such as

(Continued on following page)

These two points are determinative. No reported appellate decision has ever subjected non-resident individuals lacking any economic relationship to the state to state income taxes.

This Court's prior opinions further indicate that travel is a fundamental right, which may not be unduly burdened by state taxation or otherwise. *See Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 49 (1867); *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969). If the right to travel is to be accorded any dignity, it must include the right to move from one place to another, without stopping, free from the burdens associated with an *income* tax imposed upon the exercise of that right.

II. THE DECISION OF THE IDAHO SUPREME COURT IS NOT IN CONFLICT WITH ANY REPORTED APPELLATE OPINION.

Contrary to Petitioners' assertions herein, the Idaho Supreme Court's decision below is not in conflict with any reported decision. Perhaps this is due to the fact that no other state has *ever* tried to impose an income tax on a non-resident whose *sole* contact with the state consists of travelling through it on a nonstop train. *Compare Crandall v. Nevada, supra,* where the Court termed a state passenger tax an impermissible entrance and exit fee, void under fundamental principles of federalism.

(Continued from previous page)

transportation, fire and police protection." *Id.*, 279 F.Supp. at 47. Respondents are provided only one of the benefits enumerated in *Levitt*, police protection. Respondents submit that any traveler or tourist is provided police protection, and that such police protection does not entitle a state to tax the traveler's or tourist's income.

Petitioners rely upon *Lung v. O'Chesky*, 617 P.2d 1317 (N.M. 1980), in which the New Mexico Supreme Court upheld state income taxation of non-residents in the state while working at a federal enclave, for the proposition that the decision of the Idaho Supreme Court is in direct conflict with the decisions of another state supreme court. Petitioners' arguments are incorrect and misleading.

There is no description in *Lung* of the nature of the taxpayers' contacts with New Mexico, although it is clear that the federal employees working in the federal enclave were subject to state taxation under the Buck Act, 4 U.S.C. § 106. For all that we can tell from the New Mexico decision, the taxpayers may have been either non-residents commuting into New Mexico to work or temporary domiciliaries of the State of New Mexico, probably the former. *See* 617 P.2d at 1318-19.

It is nowhere suggested in *Lung*, as petitioners infer, that the non-residents were taxed for travel to and from a federal enclave. *Lung* cannot be said to stand for the proposition that mere physical presence in a state constitutes a "substantial nexus" sufficient to support the imposition of state income taxes, absent interaction of any kind with the local economy.

The necessity of such economic contact to impose an income tax is recognized in *State of Alaska v. Petronia*, 418 P.2d 755 (Wash. 1966), app. dismissed, 389 U.S. 7, 88 S.Ct. 36 (1967). In *Petronia*, Washington residents worked on ships which traveled from Washington to Alaska, and while in Alaska docked at a port, apparently to load or

unload passengers or freight. Alaska sought to tax the incomes earned while in Alaska waters.

The Washington Supreme Court held that the economic relationship between the taxpayer employees and the state, which generated the taxpayers' wages, was a sufficient basis for the imposition of the tax. *See* 418 P.2d at 758 ("The business productivity generated by Alaska was accountable for the wages earned by the defendants when they were in Alaskan waters").

The *Petronia* court made it clear that the act of traversing Alaskan waters was not itself sufficient to support a state income tax. Rather, the court focused upon the economic activity in the taxing state of which the taxpayers were an integral part, and which gave rise to the taxpayers' wages. *Id.*[5]

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[5] The *Petronia* decision is clearly distinguishable from the case at bar. Assuming for the sake of argument that the ships the seamen occupied had to travel through the territorial waters of another state in order to reach Alaska. Under the Petitioners' theory of income taxation, the seaman would be taxable for merely travelling through the territorial waters of the intervening state. However, under the reasoning of the *Petronia* court, the state of taxation would only be Alaska, where the ships dock, and the seaman load and unload freight – i.e., the state where there exists not only the physical presence but also the economic presence of the seamen. Unlike the seamen in *Petronia* who docked in Alaska and were found subject to income tax in Alaska, the trainmen in the *Blangers* case do not dock in Idaho, but merely pass through Idaho to a further docking destination.

The Idaho Supreme Court below applied the reasoning of the Washington Supreme Court, and the principles announced in *Petronia*, to the question whether respondents are taxable in Idaho. Petitioners' App. at 16, 44. The reasoning employed in *Petronia* has been called the "business income generation concept." *See Sjong v. State*, 622 P.2d 967, 971 (Alaska 1981).

Using this accepted method for determining whether the due process clause of the fourteenth amendment permits Idaho to tax Respondents, the Idaho Supreme Court held that it does not, because Respondents' wages are not generated by or in Idaho. Petitioners' App. at 16, 44. The Court noted that the reasoning of the Idaho Tax Commission was dangerous, and could extend to the taxation of *any* traveler who happened to be compensated for the travel time in question. (Petitioners' App. at 49, 50.) Such a result would be entirely unprecedented, and unacceptable.

III. THE IDAHO SUPREME COURT DECISION HEREIN IS ENTIRELY CONSISTENT WITH THIS COURT'S PRECEDENTS.

In *Miller Brothers Co. v. Maryland*, 347 U.S. 340 (1954), this Court held that due process requires "some definite link, some minimum connection, between the state and the person, property, or transaction it seeks to tax." While this Court has never construed the due process clause in regard to nonresidents on through trains traversing the taxing state without stopping, several fundamental propositions have been advanced by this Court which apply to the present case.

In *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), this Court was asked to decide whether a state could tax portions of a nonresident corporation's net income, where the tax was nondiscriminatory and fairly apportioned to the taxpayer's economic activities in the state. In holding that such a tax was permissible, the Court stated, "a State cannot impose taxes upon persons passing through the state, or coming into it for a temporary purpose." *Id.* at 458, *citing Robbins v. Shelby County Taxing District*, 120 U.S. 489, 493, 494 (1887).

In *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977), the taxpayer maintained two offices in the state, and solicited purchases by direct-mail advertising. The California Supreme Court upheld the imposition of use tax collection liability, holding that the "slightest presence" within the taxing state was sufficient to support a tax under the due process clause. *See* 16 Cal.3d 637, 644, 547 P.2d 458, 462 (1976). This Court affirmed the result, but noted that the "affirmance of the California Supreme Court is not to be understood as implying agreement with that court's 'slightest presence' standard of constitutional nexus." 430 U.S. at 556.

The Idaho Supreme Court decision implicitly recognized that imposition of the state income tax upon nonresident wage-earners who merely travel through the state on paid time would fall within the "slightest presence" standard expressly rejected in *National Geographic*. Indeed, it is difficult to imagine a "slighter" presence within the taxing state than that presented herein. If respondents' due process rights are not violated by such a tax, then there is no limit to State income taxation of nonresidents who come within a state's borders, whether

on foot, in an automobile or train, or overhead in an airplane on a business trip to some other state or country, during a tax year. But this Court, by the language of the decisions quoted above, has clearly indicated that states may not do so.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977), Mississippi sought to apply a tax on the privilege of doing business therein to a motor carrier which unloaded automobiles from a train in the state, and delivered the automobiles to dealers, also located in the state. This Court held that the tax was permissible, because there was a "substantial" or "sufficient" nexus between Mississippi and the taxpayer's economic activities therein which satisfied the commerce clause nexus requirement. *Id.* at 278, 287, 51 L.Ed.2d at 330, 336.

Respondents submit that mere physical presence, without economic activity related to state markets or the like, is neither "substantial" nor "sufficient" within the meaning of *Complete Auto Transit*. *See also Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue*, 483 U.S. 232, ___, 97 L.Ed.2d 199, 215-16, 107 S.Ct. 2810, 2820 (1987) ("the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in [the] state").

The suggestion by Petitioners herein that Respondents regularly travel through the State of Idaho is not only inaccurate, as set forth above. It is also a constitutional irrelevancy. *See Crandall v. Nevada, supra*, 73 U.S. (6 Wall.) at 49 ("[w]e are all citizens of the United States,

and as members of the same community must have the right to pass and repass through every part of it without interruption").

This case no doubt involves fundamental questions regarding state income taxation of non-resident individuals. If Petitioners' arguments should be sustained, any interstate business traveler could be affected. The record keeping requirements alone for taxing a business traveler under Petitioners' theory would constitute a tremendous and unjustified burden on both travel and commerce.[6]

If the rail employees are subject to state income tax for passing through the state, then other business travelers are subject to state income tax for presence within a state during a tax year. For example, a salaried travelling salesman who drives from his home in New York to make a sale in Boston would be subject to state income tax in Connecticut; or a Washington, D.C. attorney taking the train to a deposition in New Jersey would be subject to state income taxes in Delaware. There is literally no end to such possibilities under Petitioners' due process theory.

In addition, some state subdivisions impose income taxes. The business traveler thus could be subject not only to state taxes but also to income taxes in any city,

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[6] The dissenting Idaho Supreme Court justices recognized the record keeping problems created by state income taxes imposed on travelers. Petitioners' App. at 56-57 (Huntley, J., dissenting from denial of petition for rehearing). The dissent suggests the use of computers for such purposes. Whether the use of a computer in such circumstances can be required of a taxpayer raises issues beyond the scope of this brief.

county or hamlet through which he might pass or over which he might fly in his business travels. Such exercises of state taxing power would seriously and unreasonably burden interstate travel and commerce.

CONCLUSION

The Idaho Supreme Court decision involves important issues governing state taxation of individuals engaged in interstate commerce. The decision, however, is not in conflict with any other appellate decision. It is squarely grounded in applicable precedents established by this Court, is equitable and should stand without necessity of review by this Court. The Petition should be denied.

Respectfully submitted,

* John R. Quinlan
William Fremming Nielsen
Milton G. Rowland
Of-
Paine, Hamblen, Coffin,
Brooke & Miller
1200 Washington Trust
Financial Center
Spokane, Washington 99204

Attorneys for Respondents

* Counsel of Record
for Respondents

February 21, 1988